

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

UNITED STATES OF AMERICA,

Plaintiff and  
Counterclaim  
Defendant,

v.

ATLANTIC RICHFIELD COMPANY,

Defendant and  
Counterclaimant.

CIVIL ACTION NO.  
No. CV-89-039-BU-PGH

STATE OF MONTANA,

Plaintiff and  
Counterclaim  
Defendant,

CONFEDERATED SALISH AND  
KOOTENAI TRIBES,

Intervenor,

v.

ATLANTIC RICHFIELD COMPANY,

Defendant and  
Counterclaimant.

CIVIL ACTION NO.  
No. CV-83-317-HLN-PGH

STREAMSIDE TAILINGS OPERABLE UNIT  
AND FEDERAL AND TRIBAL NATURAL RESOURCE DAMAGES  
CONSENT DECREE

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## **I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in the matter of CV-89-039-BU-PGH ("the Federal Action") pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, against the Atlantic Richfield Company ("ARCO").

B. The United States in its complaint seeks recovery of past response costs and declaratory judgment of liability for future response costs incurred at or in connection with the Original Portion of the Silver Bow Creek/Butte Area NPL Site, the Milltown Reservoir Sediments NPL Site, and the Anaconda Smelter NPL Site. The claims asserted by the United States include claims for, inter alia: (1) reimbursement of past response costs incurred by EPA and the Department of Justice for response actions at the Streamside Tailings Operable Unit ("SST OU") of the Silver Bow Creek/Butte Area NPL Site in Montana, together with accrued Superfund Interest; and (2) declaratory judgment of liability for future response costs incurred at the SST OU.

C. The United States also has a claim, presently unfiled, that ARCO failed or refused to comply with Administrative Order Docket No. CERCLA VIII-96-08, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and therefore is liable for civil penalties pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b) and punitive damages pursuant to Section 107(c) of CERCLA, 42 U.S.C. § 9607(c).

D. The United States Department of the Interior ("DOI") asserts that it is a trustee for natural resources in the Clark Fork River Basin (as this term is defined below), including but not limited to threatened and endangered species, migratory birds, and resources located on lands owned, operated, or managed by DOI. DOI has a claim, presently unfiled, that ARCO is

liable for damages for injuries to those natural resources in the Clark Fork River Basin pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607.

E. The State of Montana ("State") filed a complaint in the matter of CV-83-317-HLN-PGH ("the State Action") pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and the Montana Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), § 75-10-715(2)(b), MCA.

F. The State asserts that it is the trustee for natural resources within the Clark Fork River Basin, including but not limited to the fisheries, wildlife, surface water, and groundwater within the Basin. The State in its complaint seeks recovery for natural resources injured as a result of the release of hazardous substances.

G. The State also has a claim, presently unfiled, that ARCO is liable for past and future response costs at, inter alia, the SST OU under CERCLA and CECRA.

H. The Confederated Salish and Kootenai Tribes of the Flathead Reservation ("the Tribes" ) assert that they are a trustee for natural resources within the Clark Fork River Basin, including but not limited to the fisheries resources. The Tribes moved to intervene in the State Action seeking recovery for natural resources injured as a result of the release of Hazardous or Deleterious Substances. The Court granted permissive intervention to the Tribes as specified and limited in the Order of January 20, 1997.

I. In the Federal Action, ARCO filed counterclaims against the United States, seeking cost recovery, contribution, contractual indemnity, equitable indemnification, recoupment, and declaratory relief.

J. In the State Action, ARCO filed counterclaims against the State, seeking, inter alia, contribution for response costs and natural resource damages incurred and to be incurred at the SST OU.

K. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the Milltown Reservoir Sediments Site on the National Priorities List ("NPL") by publication in the Federal Register on September 8, 1983 at 48 Fed. Reg. 40658. As originally listed, the Milltown Reservoir Sediments Site included the contamination found in the reservoir bed behind the Milltown Dam near Milltown, Montana, and resulting contamination of other media, such as the groundwater near the reservoir bed and surface water at and below the reservoir. As noted in Paragraph N, the Milltown Reservoir Sediments Site currently also includes the Clark Fork River Operable Unit.

L. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the Anaconda Smelter Site on the NPL on September 8, 1983 at 48 Fed. Reg. 40658. The Anaconda Smelter Site includes, but is not limited to, the actual site of the Anaconda Reduction Works and associated real property and buildings (this area is commonly called the "Smelter Hill Complex"), the "Old Works," the Anaconda Tailings Ponds, the Opportunity Tailings Ponds, the Slag Pile, the Flue Dust Storage Facility southeast of the smelter facilities, the Arbiter Works, the unincorporated former community of Mill Creek evacuated in the early 1980s, several smaller waste impoundments, and several square miles of soil contaminated by arsenic and various heavy metals as a result of past emissions from the smelters.

M. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the Montana Pole and Treating Plant Site on the NPL by publication in the Federal Register on July 22, 1987 at 52 Fed. Reg. 27623. The Montana Pole and Treating Plant Site is located in Silver Bow County in Butte, Montana and comprises the site of a former wood treating plant and associated contamination. Plant operations at the Montana Pole and Treating Plant Site resulted in the release of Hazardous or Deleterious Substances (as this term is defined below) including, but not limited to, pentachlorophenol ("PCP") and PCP-contaminated wood treating oil, into surface and subsurface soils, surface water and groundwater.



N. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the original Silver Bow Creek (SBCO) Site on the NPL by publication in the Federal Register on September 8, 1983 at 48 Fed. Reg. 40658. As originally listed, the SBCO NPL Site began at the headwaters of the Silver Bow Creek, proceeded down to Warm Springs Ponds, and continued down the Clark Fork River to the Milltown Reservoir. The SBCO NPL Site included the SST OU, which is the main subject of this Consent Decree. The SBCO NPL Site was amended on July 22, 1987, 52 Fed. Reg. 27627, to include large areas in and around Butte, and became known as the Silver Bow Creek/Butte Area NPL Site. In February, 1990, the Clark Fork River portion of the Silver Bow Creek/Butte Area Site was transferred to the Milltown Reservoir Sediments NPL Site. The SST OU remains a part of the Silver Bow Creek/Butte Area NPL Site.

O. The decision by the Montana Department of Environmental Quality ("DEQ") and EPA on the remedial action to be implemented at the SST OU is embodied in a final Record of Decision, executed on November 28 and 29, 1995, respectively. The Record of Decision includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b). DEQ and EPA issued an Explanation of Significant Differences ("ESD") on August 28 and 31, 1998, respectively.

P. Pursuant to a Superfund Memorandum of Agreement (as this term is defined below) which was executed prior to the date of lodging of this Consent Decree, the State, through the DEQ, has lead responsibility for the implementation of the selected remedy at the SST OU.

Q. The State and ARCO have entered into a consent decree ("the State CD"), lodged on June 19, 1998, which settles a portion of the State's claims and ARCO's

counterclaims in the State Action. The State CD is contingent upon the entry of this Consent Decree (as this term is defined below).

R. The Parties (as this term is defined below) have negotiated this Consent Decree in good faith and in consideration of the recoveries provided for in the State CD and in recognition of the requirements of that decree.

S. The State, the Tribes, and the United States on behalf of DOI, have entered into a Memorandum of Agreement addressing the restoration of natural resources in the Clark Fork River Basin.

T. By entering into this Consent Decree, the Parties do not admit any liability arising out of the transactions or occurrences alleged in the complaints or counterclaims filed in either of the above-captioned actions, or with respect to any unfiled claims.

U. In entering into this Consent Decree, the United States, the State, and the Tribes each has negotiated on its own behalf. In entering into this Consent Decree, none of the Parties is acknowledging the trusteeship of any other Party to this Consent Decree. Nothing in this Consent Decree is intended to imply that any natural resource trustee with an interest in the Clark Fork River Basin is in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources of the Clark Fork River Basin.

V. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the SST OU and the restoration of certain natural resources within the Clark Fork River Basin and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. GENERAL PROVISIONS

1. Jurisdiction and Venue. This Court has jurisdiction over the subject matter of these actions pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b), and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the claims arising under the laws of the State. This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. It is understood that by filing this Consent Decree in the two cases, Montana v. ARCO, No. CV-83-317-HLN-PGH and United States v. ARCO, No. CV-89-039-BU-PGH, there is no intention, nor should one be implied, that the two cases are consolidated for any purpose. Moreover, there is no intention, nor should one be implied, that any Party to this Consent Decree shall, by virtue of this Consent Decree, become or be deemed a party to either case, without other pleadings or orders allowing such status, nor is any Party waiving its objections to requests for intervention in either case of any other Party.

2. Retention of Jurisdiction. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XII (Dispute Resolution for Disputes Involving EPA/DEQ) or Section XIII (Dispute Resolution for Disputes Involving DOI).

3. Appendices. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the 1995 Record of Decision, attachments, and the ESD.

"Appendix B" is the Instructions for payments to the United States.

"Appendix C" is the map of Wetlands with 2.3 FEWA in the Opportunity Ponds area .

4. Parties Bound. This Consent Decree applies to and is binding upon the United States, the State, the Tribes, and ARCO and its successors and assigns. Any change in ownership or corporate or other legal status of ARCO including, but not limited to, any transfer of assets or real or personal property, shall in no way alter ARCO's responsibilities under this Consent Decree.

5. Signatories. The undersigned representative of ARCO, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, the Governor of the State of Montana, and Chairman of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

6. Agreement Not to Oppose Entry. Each Party hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States or the State has notified the other Parties in writing that it no longer supports entry of this Consent Decree after consideration of public comment, as provided in Section XXI (Lodging and Opportunity for Public Comment) below.

7. Definitions. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms

listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "ARAR" shall mean an applicable or relevant and appropriate requirement, criteria, standard, or limitation of federal or state law within the meaning of Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2).

b. "ARCO" shall mean the Atlantic Richfield Company, its divisions, subsidiaries, including ARCO Environmental Remediation L.L.C., and any predecessors in interest. ARCO shall also mean its successors in interest to the extent that any such successors' liability at the Clark Fork River Basin derives from the liability of the Atlantic Richfield Company, its divisions, subsidiaries, including ARCO Environmental Remediation L.L.C., and any predecessors in interest.

c. "ARWWS OU" shall mean the Anaconda Regional Water, Waste and Soils Operable Unit.

d. "Additional Costs" shall mean costs of implementing the Remedy that exceed \$80,000,000 plus Earnings (as this term is defined below). Additional Costs do not include any response costs incurred as a result of claims reserved pursuant to Paragraphs 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to Response Actions), 78.g. (General Reservations of Rights of the United States), 81 (State's Pre-Certification Reservations), 82 (State's Post-Certification Reservations), or 84.a.vi.. (State's General Reservations of Rights).

e. "All Sites" shall mean the Upper Clark Fork River Basin above the confluence of the Little Blackfoot River and the Clark Fork River near Garrison (i.e. the main stem of the Clark Fork River and all areas which naturally drain into the Clark Fork River or its tributaries above this confluence near Garrison) and the main stem of the Clark Fork River

between the Idaho/Montana border and Garrison, including the Milltown Reservoir, and its riparian zone. "All Sites" includes the areas encompassed within the Clark Fork NPL Sites.

f. "Biological Resources" shall mean those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. Fish and wildlife include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species. Other biota encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

g. "Category of Injury" shall mean changes in the physical or chemical quality described for geologic resources at 43 C.F.R. § 11.62(e) (1998) and the biological responses described at 43 C.F.R. § 11.62(f) (1998) for Biological Resources.

h. "CECRA" shall mean the Montana Comprehensive Environmental Cleanup and Responsibility Act, as amended, §§ 75-10-701 et seq., MCA.

i. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

j. "Clark Fork NPL Sites" shall mean the Anaconda Smelter Site, the Silver Bow Creek/Butte Area Site, the Milltown Reservoir Sediments Site, and the Montana Pole and Treating Plant Site.

k. "Clark Fork River Basin" shall mean the mainstem of the Clark Fork River to the Idaho border and all areas within Montana that naturally drain into the Clark Fork River or its tributaries.

l. "Cost Documentation" shall mean a cost package for EPA's costs which consists of applicable: (1) payroll information, consisting of the SCORE\$ report or an equivalent cost summary and all time sheets; (2) indirect cost information, consisting of an overall and an employee by employee SCORE\$ report or equivalent cost summary; (3) travel information, consisting of a SCORE\$ report or an equivalent cost summary, travel authorizations and travel

vouchers; (4) EPA contractor (including Contract Laboratory Program contracts) information, consisting of site and/or Operable Unit (as this term is defined below) specific vouchers, any existing progress reports, Treasury schedules, tasking documents for contractors not required to provide progress reports, Annual Allocation Reports, and the SCORE\$ report or an equivalent cost summary; (5) EPA Interagency Agreements ("IAGs") information, consisting of SCORE\$ reports or an equivalent cost summary, IAGs and any amendments thereto, invoices or the equivalent, proof of payment documents, and any existing progress reports, (6) EPA Cooperative Agreements information, consisting of SCORE\$ reports or an equivalent cost summary, cooperative agreements and any amendments thereto, drawdown documentation, State quarterly progress reports; (7) prejudgment interest information, consisting of an interest cost report showing methodologies and calculations; and (8) Operable Unit allocated cost information, consisting of a narrative of allocation methodologies and spreadsheets implementing such methodologies. For past cost packages produced under Section VII (Framework for Future Settlement Negotiations), Department of Justice response cost information shall consist of timesheets, travel authorization and travel vouchers, invoices and proof of payment for direct and contractor costs, interest calculations, and a cost summary. Because the State will be the lead agency for implementation of the SST OU response actions, Cost Documentation for all Operable Units will also include State contractor invoices, any existing contractor progress reports, and form 661 SBAS information (if not contained with the State quarterly progress reports) or its equivalent.

m. "Certification of Completion" shall mean EPA's certification pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), that the Remedial Action and any modifications thereto have been completed at the SST OU in accordance with the requirements of CERCLA, the NCP, and the ROD and any modifications thereof, including that Performance Standards have been attained.

n. "Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Paragraph 3 (Appendices)). In the event of conflict between this Decree and any appendix, this Decree shall control.

o. "DEQ" shall mean the Montana Department of Environmental Quality and any predecessor or successor departments or agencies of the State.

p. "DOI" shall mean the United States Department of the Interior and any successor departments or agencies.

q. "DOJ" shall mean the United States Department of Justice and any successor departments or agencies.

r. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under the Consent Decree, where the last day would fall on a Saturday, Sunday, or State or Federal holiday, the period shall run until the close of business of the next working day.

s. "Earnings" shall mean the net earnings on the principal paid into the SST OU Fund and/or compounded on the SST OU Fund as managed by the State Board of Investments, and any State CD Interest paid by ARCO pursuant to subparagraph 15.c. (Payment of Future Costs by ARCO) and pursuant to the State CD on the amounts paid into the SST OU Fund (as this term is defined below).

t. "Effective Date" means the date upon which either the Consent Decree or the State CD is entered as a final judgment under Fed. R. Civ. P. 54(b), whichever occurs later, and which includes the expiration of any time for taking an appeal by any person not a party to the Consent Decree.

u. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.



v. "ESD" shall mean the Explanation of Significant Differences issued for the SST OU by DEQ and EPA on August 28 and 31, 1998, respectively.

w. "Federal Action" shall mean United States v. Atlantic Richfield Company, No. CV-89-039-BU-PGH (D. Mont.).

x. "FEWA" shall mean the functional effective wetlands area as determined pursuant to ARCO, Evaluation Form for Determining Wetland Functional Value and Effective Wetland Areas in Upper Clark Fork River Superfund Sites (August 1992). A FEWA unit shall be equal to the product of the actual wetland area and the overall wetland rating divided by three.

y. "FEWA Scale" shall mean the Functional Effective Wetlands Area scale which has been approved by EPA and accepted by FWS, as defined in ARCO, Evaluation Form for Determining Wetland Functional Value and Effective Wetland Areas in Upper Clark Fork River Superfund Sites (August 1992).

z. "Future Response Costs" shall mean all costs that the United States and the State incur after April 1, 1998 in implementing the Remedy at the SST OU including the cost of oversight, reviews of the Remedy (as this term is defined below) and any modifications thereto required by Section 121(c) of CERCLA after entry of the Consent Decree, and allocable Clark Fork General and SBCO Site-wide costs.

aa. "FWS" shall mean the U.S. Fish and Wildlife Service and any successor bureaus, departments, or agencies.

bb. "Hazardous or Deleterious Substance" shall mean a hazardous substance within the meaning of Section 101(14) of CERCLA or a hazardous or deleterious substance within the meaning of CECRA, Section 75-10-701(8), MCA.

cc. "Natural Resource Damages" shall mean damages or other relief for injury to, destruction of, or loss of natural resources, including the cost of assessing such injury,

destruction, or loss resulting from a release of Hazardous or Deleterious Substances, and including interest and litigation costs.

dd. "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

ee. "NPL" shall mean the National Priorities List set forth at 40 C.F.R. Part 300, Appendix B.

ff. "Operable Unit" or "OU" shall mean an area, geographic or otherwise, for which there is a response action, whether removal or remedial, that is subject to a separate administrative record and response selection decision.

gg. "Operation and Maintenance" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan to be developed for the SST OU.

hh. "Paragraph" shall mean a portion of the Consent Decree identified by an Arabic numeral or an upper or lower case letter.

ii. "Parties" shall mean the United States, the State, the Tribes, and ARCO.

jj. "Past Response Costs" shall mean all costs that the United States has incurred at or in connection with the SST OU through March 31, 1998, including, without limitation, oversight costs, allocable Clark Fork General and SBCO Site-wide costs, and Superfund Interest (as this term is defined below) on all such costs pursuant to 42 U.S.C. § 9607(a), and any such costs that the State has incurred at or in connection with the SST OU through March 31, 1998; provided, however, Past Response Costs shall not include Assessment and Litigation Costs reserved by the State in subparagraph 22.c. of the State CD.

kk. "Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedy, as set forth in Section IX, Section X and Appendix A of the ROD, as modified by the ESD.

ll. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

mm. "Record of Decision" or "ROD" shall mean the EPA/State Record of Decision in which the final remedial action relating to the SST OU is set forth, as executed on November 28, 1995 by the Director of the Montana Department of Environmental Quality and on November 29, 1995 by the Regional Administrator, EPA Region VIII, including all attachments thereto, as modified and clarified by the ESD. The ROD, attachments, and the ESD are attached as Appendix A.

nn. "Remedial Action" shall mean the response actions at the SST OU set forth in the Record of Decision, including remedial design and oversight, and excluding Operation and Maintenance.

oo. "Remedy" shall mean the response actions at the SST OU set forth in the Record of Decision, including oversight, Operation and Maintenance, and remedial design.

pp. "Restored Wetlands" shall mean Wetlands that are of comparable quality and habitat value to certain Wetlands existing within or in the vicinity of the ARWWS OU at the time of lodging of the Consent Decree. These Wetlands have a functional value rating of 2.3 on the FEWA Scale. The locations of Wetlands having a rating of 2.3 on the FEWA scale are shown on the attached map, Appendix C.

qq. "Rocker OU" shall mean the Rocker Timber Framing and Treating Plant Operable Unit near Rocker, Montana, as more specifically described in the December 1995 Rocker OU record of decision.

rr. “SMOA” shall mean the Superfund Memorandum of Agreement between EPA and DEQ, which memorializes the manner in which funds will be used from the SST OU Fund, established in paragraph 14 of the State CD.

ss. “SST OU” shall mean the Streamside Tailings Operable Unit of the Silver Bow Creek/Butte Area NPL Site in Silver Bow County, Montana. The SST OU comprises the geographic area of contamination along and in Silver Bow Creek between the western end of the Colorado Tailings area and the point at which Silver Bow Creek enters the Warm Springs Ponds, extending for approximately 24 river miles, and including the Hazardous or Deleterious Substances associated with the mining, milling, and smelting waste in Silver Bow Creek, fluvially deposited mining, milling, and smelting wastes along the banks of Silver Bow Creek, the adjacent railroad beds, and all areas in close proximity which are necessary for implementation of the Remedy or any modifications thereto. It expressly excludes the Rocker OU.

i. The Parties recognize that the SST OU lies between other Operable Units, both upstream and downstream, which collectively comprise portions of the Silver Bow Creek/Butte Area NPL Site and the Clark Fork River/Milltown Reservoir NPL Site. The continuing migration of contamination from upstream Operable Units in Butte will be considered by EPA and the State in the design and implementation of the Remedy and any modifications thereof, and restoration actions for the SST OU; provided, however, nothing in this subparagraph 7.ss.i. (Definitions) shall be interpreted to grant ARCO or any other party a right to challenge the Remedy or any modification thereof or challenge the use of the SST OU Fund, except as expressly provided in Paragraph 17 (Obligations for Additional Costs). Except as expressly provided in this subparagraph 7.ss.i. (Definitions), the SST OU shall not include, and therefore the Consent Decree shall not address or alter the liability of any Party for, future releases of Hazardous or Deleterious Substances from other Operable Units that re-

contaminate the SST OU, from any of the following categories of releases: (1) releases of Hazardous or Deleterious Substances resulting from ARCO's failure to comply fully and timely with lawful cleanup requirements for upstream Operable Units as required by the State or the United States, (2) releases of Hazardous or Deleterious Substances resulting from the failure of upstream retaining walls, settling pond dams, or other upstream control measures, or (3) any upstream releases of Hazardous or Deleterious Substances other than the anticipated continuation of existing migration. Notwithstanding the previous sentence, none of the Settling Federal Agencies shall be liable for re-contamination of the SST OU that results from ARCO's failure to comply fully and timely with lawful cleanup requirements for upstream Operable Units; provided, however, that nothing in this subparagraph 7.ss.i. (Definitions) shall relieve the Settling Federal Agencies of any other liability they may have for upstream Operable Units.

ii. At its downstream end, Silver Bow Creek discharges into the Warm Springs Ponds Active Area and Inactive Area Operable Units. The SST OU shall not include releases of Hazardous or Deleterious Substances from the SST OU into the Warm Springs Ponds Active Area and Inactive Area Operable Units. Such releases shall be addressed pursuant to the Unilateral Administrative Order, Docket No. CERCLA-VIII-91-25 issued to ARCO relating to the Warm Springs Ponds Active Area Operable Unit and Unilateral Administrative Order, Docket No. CERCLA-VIII-93-23 issued to ARCO relating to the Warm Springs Ponds Inactive Area Operable Unit, or any other provision of law. ARCO shall not assert this settlement or implementation of the Remedy or any modification thereof as a basis for claims against the United States or the State for contaminant or other discharges into the Warm Springs Ponds, the Warm Springs Ponds Operable Units, the Clark Fork River, or the Milltown Reservoir.

iii. Treatment of contamination passing through and mobilized in the SST OU is not required of the Agencies as part of the implementation of the Remedy and

construction activities in the implementation of the Remedy cannot entirely avoid mobilizing contamination. However, the Agencies intend to use best management practices in accordance with the Agencies' obligation to comply with ARARs in the implementation of the Remedy or any modifications thereof. Any violations of the water quality performance standards for the Warm Springs Ponds Active Area and Inactive Area Operable Units (as those terms are defined below) that result from implementation of the Remedy, including the failure of EPA or DEQ to use appropriate best management practices, shall be deemed Upset Conditions, as that term is used in the Warm Springs Ponds Active Area Order, if ARCO complies with the Upset Conditions requirements of Exhibit 5 to the Warm Springs Ponds Active Area Order or, with respect to the Warm Springs Ponds Inactive Area Operable Unit, not a violation of that Order. Disputes arising out of the application of Upset Conditions to releases of Hazardous or Deleterious Substances into the Warm Springs Ponds shall be governed by the provisions of the Warm Springs Ponds Active Area Order.

tt. "SST OU Fund" shall mean the fund established in accordance with paragraphs 14 and 15 of the State CD.

uu. "Section" shall mean a portion of the Consent Decree identified by a roman numeral.

vv. "Settling Federal Agencies" shall mean DOJ, DOI, the Bureau of Mines, the Bureau of Land Management, the United States Geological Survey, United States Department of the Treasury, the United States Department of Commerce, the United States Department of Agriculture, the United States Department of Agriculture Forest Service, the General Services Administration, the National Aeronautics and Space Administration, the United States Department of Defense, the Environmental Protection Agency, the United States Department of Health and Human Services, the United States Public Health Service, the Atomic Energy Commission, the Defense Minerals Exploration Administration, the Defense Minerals

Administration, the Office of Minerals Exploration, and the Defense Minerals Procurement Agencies, and any predecessor and successor departments, agencies, bureaus, or services.

xx. "Site Record" shall mean the file presently maintained in EPA's Montana Office records center designated as the repository for documents related to a particular Operable Unit that are not contained in the administrative record for that Operable Unit and are not confidential.

yy. "State" shall mean the State of Montana, including all of its departments, agencies, and programs.

zz. "State Action" shall mean State of Montana v. Atlantic Richfield Company, No. CV-83-317-HLN-PGH (D. Mont.).

aaa. "State CD" shall mean the Consent Decree lodged in the District of Montana in civil action number CV-83-317-HLN-PGH on June 19, 1998.

bbb. "State CD Interest" shall mean interest accrued at the rate in accordance with paragraph 10 of the State CD.

ccc. "Superfund Interest," in accordance with 42 U.S.C. § 9607(a), shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, 26 U.S.C. § 9507, compounded on October 1 of each year.

ddd. "Treasury Interest" shall mean interest accrued at the rate established by the Secretary of the Treasury under 31 U.S.C. § 3717.

eee. "Tribes" shall mean the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

fff. "United States" shall mean the United States of America, including all of its departments, agencies, and instrumentalities.

ggg. “Upper Clark Fork River Basin” or “UCFRB” shall mean the main stem of the Clark Fork River and all areas which naturally drain into the Clark Fork River or its tributaries above the Milltown Dam, except for the Blackfoot River and its tributaries. The Clark Fork NPL Sites are within the “Upper Clark Fork River Basin.”

hhh. “Warm Springs Ponds Active Area Operable Unit” shall mean the area described in the September 1990 Warm Springs Ponds Record of Decision and all associated explanations of significant differences and errata sheets.

jjj. “Warm Springs Ponds Inactive Area Operable Unit” shall mean the area described in the June 1992 Warm Springs Ponds Inactive Area Record of Decision and all associated explanations of significant differences and errata sheets.

kkk. “Wetlands” shall mean areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including those areas inundated up to 2 meters, as specified on pages 13-14 of the U.S. Army Corps of Engineers Wetlands Delineation Manual (January 1987).

III. “Wetlands/Riparian Area Restoration Costs” shall mean all funds reasonably expended by the State or the Tribes, as applicable, to acquire, restore, protect, or enhance areas required in Section IV (Federal and Tribal Natural Resource Damages), including indirect, planning, and administrative costs, regardless of the source of those funds.

8. Notices and Submissions. Whenever, under the terms of the Consent Decree, written notice is required to be given or a report or other document is required to be sent or served by one Party to or upon another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Except as otherwise specifically provided, written notice as



specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOI, the State, the Tribes, the Settling Federal Agencies, and ARCO, respectively.

As to the United States:

Chief  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-2-430

Chief  
Environmental Defense Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Re: DJ # 90-11-3-619

As to EPA:

Remedial Project Manager - SST OU  
EPA Project Coordinator  
U.S. Environmental Protection Agency  
Region VIII, Montana Office  
301 South Park Street, Federal Building  
Drawer 10096  
Helena, MT 59624

Enforcement Attorney - SST OU  
U.S. Environmental Protection Agency  
Region VIII, Montana Office  
301 South Park Street, Federal Building  
Drawer 10096  
Helena, MT 59624

As to DOI:

Montana State Director  
Bureau of Land Management  
Granite Tower, 222 North 32nd Street  
Billings, MT 59101

Superintendent, Grant-Kohrs Ranch NHS  
National Park Service  
P.O. Box 790  
Deer Lodge, MT 59722-0790

Field Supervisor, Montana Field Office  
Fish and Wildlife Service  
100 North Park Street, Suite 320  
Helena, MT 59601

As to the State:

William B. Kirley  
Legal Counsel  
State of Montana  
Department of Environmental Quality  
P.O. Box 200901  
Helena, Montana 59620-0901

Neil Marsh  
Federal Superfund Coordinator  
State of Montana  
Department of Environmental Quality  
P.O. Box 200901  
Helena, Montana 59620-0901

Robert G. Collins  
Assistant Attorney General

Department of Justice  
Natural Resource Damage Litigation Program  
P.O. Box 201425  
Helena, Montana 59620-1425

As to the Tribes:

Joe Hovenkotter, Esq.  
Staff Attorney/Legal Department  
P.O. Box 278, Highway 93  
Pablo, MT 59860

As to ARCO:

Sandra M. Stash  
Vice President  
ARCO Environmental Remediation L.L.C.  
307 E. Park Street, Suite 400  
Anaconda, MT 59711

Ronald C. Redcay, Esq.  
Deputy General Counsel  
Atlantic Richfield Company  
444 S. Flower St., Room 3551  
Los Angeles, CA 90071

9. Stay During Appeal. If there is an appeal of the State CD or the Consent Decree, the requirements of the Consent Decree, except: (1) the obligation to make interim payments under subparagraph 15.a. (Payment of Future Costs by ARCO), and (2) the obligations under Section VII (Framework for Future Settlement Negotiations), other than the payment obligations of Paragraph 35 (ARCO's Reserve), shall be stayed during the pendency of the appeal of the State CD or the Consent Decree. During the pendency of any such appeal, post-judgment Treasury Interest shall accrue from the date of entry of the Consent Decree on the amounts ARCO is required to pay pursuant to Paragraphs 19 (Payment by ARCO to the United States) and 20 (Payment by ARCO to the Tribes), and post-judgment Superfund Interest shall accrue from the date of entry of the Consent Decree on the amounts ARCO is required to pay under Paragraph 14 (Past Cost Reimbursement by ARCO) and Section VI (Civil Penalty). If the District Court's entry of the State CD or the Consent Decree is reversed, in whole or in part, then the Consent Decree, including the covenants provided herein, is null and void, provided however, that any interim payments made by ARCO under Paragraph 15 (Payment of Future

Costs by ARCO) shall be retained and applied to Future Response Costs, including the costs of implementing modifications to the ROD.

10. Objectives of the Parties. The objectives of the Parties in entering into the Consent Decree are to protect public health and welfare and the environment at the SST OU by the payment by ARCO of the funds to be used for the design and implementation of response actions, including operation and maintenance, at the SST OU, to reimburse past and future response costs of the United States relating to the SST OU, to resolve the claims of ARCO which have been or could have been asserted against the United States and the State with regard to the SST OU, to resolve the United States' claims for civil penalties and punitive damages for ARCO's alleged failure or refusal to comply with the SST OU Administrative Order, to provide payment to resolve all claims of the Tribes against ARCO relating to All Sites, to resolve certain Natural Resource Damages claims of the United States relating to All Sites, and to provide a framework for settling the remainder of the Federal Action as provided in the Consent Decree.

11. Use of the Consent Decree.

a. The Consent Decree, and the settlement embodied herein are intended to resolve only the matters set forth herein. This agreement shall not be used by any Party against any other Party in any litigation as an admission or otherwise, except in litigation to enforce the terms of the Consent Decree.

b. Except as expressly provided in the Consent Decree, ARCO shall not use any provision of the Consent Decree to challenge any response action at any Operable Unit or to claim or assert that any response action required by any Action Memorandum, Record of Decision or Administrative Order is inconsistent with the NCP, arbitrary and capricious, or otherwise not in accordance with law.

12. Settlement of Remaining Operable Units in the Clark Fork Litigation. The Parties acknowledge that the cash-out and cost-sharing terms of the Consent Decree are unique to the SST OU, and are being agreed to in order to facilitate the settlement of the State Action. The Parties acknowledge that these are not the preferred terms for any settlement of the other Operable Units within the Clark Fork NPL Sites or any other Site, and that this settlement will not be used as precedent for any future settlement of the Clark Fork NPL Sites or any other site.

13. Notice to Successors-in-Title.

a. With respect to any real property within the SST OU or property outside the ARWWS OU on which waste repositories created as part of the Remedial Action are located that ARCO owns or has a legal right to control access to, except for those lands which are to be transferred to the State or its designees pursuant to paragraph 9 of the State CD, ARCO shall, within 180 days after the Effective Date of the Consent Decree (or within 180 days of the identification of waste repository locations by EPA and DEQ), submit to EPA and the State for review and approval a notice to be filed with the Recorder's Office for the appropriate county in the State of Montana which shall provide notice to all successors-in-title that the property is part of the SST OU, that DEQ and EPA selected a remedy for the SST OU on November 28 and 29, 1995, respectively, and that ARCO has entered into the Consent Decree relating to implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the names and civil action numbers of these cases, and the date the Consent Decree was entered by the Court and any designated waste management units constructed or planned for the property involved. ARCO shall record the notice(s) within 20 days of EPA's approval of the notice(s). ARCO shall provide EPA with a copy of the recorded notice(s) within 10 days after its receipt of a copy bearing the clerk's recording information for each such notice.

b. With respect to each Restored Wetlands area created, enhanced, or restored by ARCO in compliance with Section IV (Federal and Tribal Natural Resource Damages), within 180 days following completion of the physical actions described in the ARCO Wetlands Plan for that area, ARCO shall submit to FWS for review and approval a notice to be filed with the Recorder's Office for the appropriate county in the State of Montana. Such notice(s) shall inform all successors-in-title that ARCO has entered into the Consent Decree relating to the restoration of natural resources and that the Wetlands on the property have been created in accordance with the Consent Decree. Such notice shall identify the features of the property to be protected and identify conservation easements or deed restrictions that exist to provide protection of the Wetlands created, restored, or enhanced by ARCO on that property in perpetuity. Such notice(s) shall also identify the United States District Court in which the Consent Decree was filed, the names and civil action numbers of these cases, and the date the Consent Decree was entered by the Court. ARCO shall record the notice(s) within 20 days of FWS's approval of the notice(s). ARCO shall provide FWS with a copy of the recorded notice(s) within 10 days of its receipt of a copy bearing the clerk's recording information for each such notice.

c. At least 30 days prior to the conveyance by ARCO of its interest in any property described in subparagraphs 13.a. and 13.b. (Notice to Successors in Title), including, but not limited to, fee interests, leasehold interests, and mortgage interests, ARCO shall give the grantee written notice of (i) the Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the SST OU pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, ARCO shall also give written notice to EPA and DEQ, or, with respect to

property described in subparagraph 13.b (Notice to Successors in Title), to FWS, of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, restrictive covenants, easements and/or conservation easements was given to the grantee.

d. In the event of any such conveyance, ARCO shall continue to meet its obligations under the Consent Decree, including, but not limited to, its obligation to provide or secure access or enforce institutional controls, pursuant to Section IX (Access and Institutional Controls) of the Consent Decree. In no event shall the conveyance release or otherwise affect the liability of ARCO to comply with all provisions of the Consent Decree, absent the prior written consent of EPA and the State, or DOI, as appropriate.

### **III. REIMBURSEMENT OF RESPONSE COSTS**

#### **14. Past Cost Reimbursement by ARCO.**

a. Within 30 days of the Effective Date of the Consent Decree, ARCO shall pay to the EPA Hazardous Substance Superfund \$3,900,000, plus Superfund Interest on that amount from November 1, 1996 to the date of payment, in compromise and settlement of Past Response Costs. Such payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 89V0279, the EPA Region and Site/Spill ID #08-22, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to ARCO by the Financial Litigation Unit of the United States Attorney's Office for the District of Montana attached as Appendix B to the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. ARCO shall send notice that such payment has been made to the United States as specified in Paragraph 8 (Notices and Submissions) and the Financial

Management Officer, EPA Region VIII, Office of Technical and Management Services, 999 18th Street, Denver, CO 80202 and Cost Recovery Coordinator, U.S. EPA, Montana Office, 301 South Park Street, Federal Building, Drawer 10096, Helena, MT 59624.

b. Within 90 days of the Effective Date of the Consent Decree, the United States shall provide to ARCO sufficient information to identify the specific costs which comprise Past Response Costs to assure that reimbursement for such Past Response Costs will not be sought again by the United States.

15. Payment of Future Costs by ARCO.

a. After lodging and in advance of the Effective Date of the Consent Decree, ARCO shall make interim payments in accordance with the requirements of this subparagraph. First, on January 31, 1999, ARCO shall pay \$15 million into the SST OU Fund. Second, by the end of January in 2000 and 2001, DEQ shall provide ARCO with an accounting of its expenditures from the SST OU Fund through the end of the prior calendar year. By the end of February 2000, ARCO shall replenish the SST OU Fund by paying into the SST OU Fund the amount of expenditures accounted for by DEQ through the end of 1999. By the end of February 2001, ARCO shall replenish the SST OU Fund by paying into the SST OU Fund the amount of expenditures accounted for by DEQ for the calendar year 2000. ARCO's obligations to make interim payments under this subparagraph is limited to three payments of up to \$15 million each. Each interim payment shall be made by electronic funds transfer as provided in paragraph 11 of the State CD. If, in accordance with Paragraph 108 (Lodging of the Decree), the United States or the State withdraws its consent to the entry of the Consent Decree, within 15 days following written notice that the United States or the State has withdrawn its consent to the entry of the Consent Decree, any interim payment made by ARCO pursuant to the Consent Decree shall be refunded to ARCO, together with all Earnings thereon.

b. Upon the Effective Date of the Consent Decree, ARCO's obligations pursuant to subparagraph 15.a. (Payment of Future Costs by ARCO) shall cease and all amounts paid by ARCO pursuant to that subparagraph shall be credited, effective as of the date of payment, toward the payment required by subparagraph 15.c. (Payment of Future Costs by ARCO). If either the Consent Decree or the State CD do not become effective, all such amounts shall be retained and applied to any obligation of ARCO for Future Response Costs.

c. In accordance with the effective date, terms, and schedule of the State CD, ARCO shall pay \$80,000,000, plus State CD Interest, to the SST OU Fund, with any interim payments being credited, effective as of the date of payment, to the payments required under the State CD.

d. The funds paid into the SST OU Fund plus Earnings shall be used to implement the Remedy or any modifications thereof, or as otherwise authorized by paragraph 15 of the State CD and subparagraph 15.e. (Payment of Future Costs by ARCO). Nothing herein allows any person to challenge the use of the SST OU Fund except as authorized by Paragraph 17 (Obligations for Additional Costs).

e. The use of the SST OU Fund will be governed by the SMOA, the State CD, and the terms of the Consent Decree. Any funds, including Earnings, in the SST OU Account which the United States and the State determine, pursuant to the SMOA, are not required for Future Response Costs and implementation of any modification of the ROD incurred by EPA or the State (including reasonable estimates for O&M) for the SST OU shall be transferred to the State's Upper Clark Fork River Basin Restoration Fund, established pursuant to paragraph 16 of the State CD.

16. Payment of Response Costs by Settling Federal Agencies.



a. As soon as reasonably practicable after the Effective Date of the Consent Decree, the United States, on behalf of the Settling Federal Agencies, shall pay to the EPA Hazardous Substance Superfund \$2,000,000, in compromise and settlement of Past Response Costs and Future Response Costs and the claims identified in Paragraphs 88 (Covenant Not to Sue by ARCO) and 95 (Contribution Protection).

b. Nothing in this Paragraph 16 (Payment of Response Costs by Settling Federal Agencies) alters EPA's obligations pursuant to Paragraph 17.b. (Obligations for Additional Costs).

c. If the payment to the EPA Hazardous Substances Superfund required by subparagraph 16.a. (Payment of Response Costs by Settling Federal Agencies) is not made as soon as reasonably practicable, the Chief, Legal Enforcement Program, EPA Region VIII may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section.

d. In the event that payments required by subparagraph 16.a. (Payment of Response Costs by Settling Federal Agencies) are not made within 30 days of the Effective Date of the Consent Decree, Superfund Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the Effective Date of the Consent Decree and accruing through the date of the payment.

e. The Parties to the Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agencies under the Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in the Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

17. Obligations for Additional Costs

a. If EPA or the State incur Additional Costs, ARCO shall reimburse the United States and the State for the amount of the Additional Costs, subject to the limitations in subparagraphs 17.b., 17.c. and 17.d. (Obligations for Additional Costs), and with the ability to dispute the Additional Cost payment as specified in subparagraphs 17.e., 17.f., 17.g., 17.h., 17.i., and 17.j. (Obligations for Additional Costs). Payment shall be made in accordance with subparagraph 17.d. (Obligations for Additional Costs).

b. The parties to the Consent Decree shall bear Additional Costs and/or costs incurred pursuant to subparagraph 78.g. (General Reservations of Rights of the United States) or subparagraph 84.a.vi. (State's General Reservations of Rights), as follows:

i. Round 1:

- (1) The State shall bear the first \$10,000,000;
- (2) ARCO shall bear the next \$20,000,000;

ii. Round 2:

- (1) The State shall bear the next \$10,000,000;
- (2) EPA shall bear the next \$10,000,000;
- (3) ARCO shall bear the next \$10,000,000;

iii. All Subsequent Rounds:

- (1) The State shall bear the next \$10,000,000;
- (2) ARCO shall bear the next \$10,000,000.

The dollar amounts specified in this subparagraph represent actual amounts that may be incurred in the future not discounted to present value.

c. No Party shall be obligated to pay any amount pursuant to this Paragraph 17 (Obligations for Additional Costs) until full payment is made by each Party whose payment obligations precede that Party's obligation. As provided in paragraph 17 of the State CD, the

State will reserve \$10,000,000 and Earnings on that amount to fund Additional Costs and/or costs incurred pursuant to subparagraph 78.g. (General Reservations of Rights of the United States) or subparagraph 84.a.vi. (State's General Reservations of Rights), if necessary. The State anticipates that such an amount will be adequate to fund any State share under Rounds 1 and 2 above. Nothing in the Consent Decree shall be interpreted or construed as a commitment or requirement that the State obligate or pay any other funds in contravention of Section 17-8-103, MCA, or any other applicable provision of law.

d. EPA shall send ARCO a bill for Additional Costs that ARCO is required to reimburse under this Paragraph 17 (Obligations for Additional Costs). Each bill shall contain an accounting and Cost Documentation for all Future Response Costs, Additional Costs, and costs of implementing any modifications to the ROD incurred since ARCO's last payment for Future Response Costs and Additional Costs. The bill shall be included in the publicly available Site Record for the SST OU maintained by EPA and the State. ARCO shall make all payments within 120 days of ARCO's receipt of each bill requiring payment, by EFT in accordance with instructions provided in the bill. ARCO shall forward a record of the payment to the United States as specified in Paragraph 8 (Notices and Submissions) and also to:

Director  
Office of Technical & Management Services  
U.S. EPA, Region VIII  
999 18th Street, Suite 500  
Denver, CO 80202

Cost Recovery Coordinator  
U.S. EPA, Region VIII  
Montana Field Office, Federal Building  
301 South Park, Drawer 10096  
Helena, MT 59626-0096

e. ARCO may only dispute bills for payment of its share of Additional Costs pursuant to the dispute resolution procedures in the Consent Decree on the following grounds:

i. with respect to a bill for a payment required under any Round of subparagraph 17.b. (Obligations for Additional Costs), that EPA or the State made an accounting error in determining the amount of Additional Costs, in determining the underlying amount expended to implement the Remedy or any modifications thereof pursuant to

subparagraph 15.d. (Payment of Future Costs by ARCO), or in determining the amount expended pursuant to any preceding Rounds of subparagraph 17.b. (Obligations for Additional Costs).

ii. with respect to a bill for a payment required under any Round of subparagraph 17.b. (Obligations for Additional Costs), that the Additional Costs required to be paid by ARCO were incurred inconsistent with the NCP, including on the basis that the costs were not incurred for removal or remedial action as those terms are defined in CERCLA and the NCP.

iii. with respect to a bill for a payment required under Round 2 or any Subsequent Rounds of subparagraph 17.b. (Obligations for Additional Costs), but not for Round 1 of subparagraph 17.b. (Obligations for Additional Costs), that the Additional Costs required to be paid were based on the expenditure of funds, either within any Round of the Additional Costs or within the underlying amount spent to implement the Remedy or any modification thereof pursuant to subparagraph 15.d. (Payment of Future Response Costs), that were incurred inconsistent with the NCP, including on the basis that the costs were not incurred for removal or remedial action as those terms are defined in CERCLA and the NCP.

iv. with respect to a bill for a payment required under any Round of subparagraph 17.b. (Obligations for Additional Costs), that the Additional Costs were based on the expenditure of funds, either within any Round of the Additional Costs or within the underlying amount spent to implement the Remedy or any modification thereof pursuant to subparagraph 15.d. (Payment of Future Response Costs), for response actions that were outside of the scope of the Remedy. In the event that ARCO prevails in its defense that any costs sought by the United States or the State pursuant to this subparagraph are outside of the scope of the Remedy, such costs may be sought by the United States under subparagraph

78.g. (General Reservation of Rights of the United States) or by the State under subparagraph 84.a.vi. (State's General Reservation of Rights).

f. In Round 1 of subparagraph 17.b. (Obligations for Additional Costs), ARCO may not challenge the Remedy and may not assert that any sum spent within the \$80,000,000, plus Earnings, plus the \$10,000,000 paid by the State in accordance with subparagraph 17.b.i.(1) (Obligations for Additional Costs), was incurred inconsistent with the NCP.

g. Except as otherwise expressly provided in this Paragraph 17 (Obligations for Additional Costs), ARCO waives all defenses to liability and defenses to the joint and several nature of its liability for Additional Costs and waives its counterclaims and any other claims against the United States and the State for Additional Costs.

h. ARCO may dispute a bill for Additional Costs only by sending to EPA and DEQ, in accordance with Paragraph 8 (Notices and Submissions), a written notice of dispute as required by Section XII (Dispute Resolution for Disputes Involving EPA/DEQ), which must be sent within 120 days of ARCO's receipt of the bill.

i. If ARCO disputes the payment of any portion of a bill for Additional Costs, ARCO shall, within 120 days of its receipt of the bill, pay all uncontested Additional Costs to the United States in the manner described in subparagraph 17.d. (Obligations for Additional Costs). If the United States or the State prevails in the dispute, within 10 days of the resolution of the dispute, ARCO shall pay the sums due (with Superfund Interest on those sums) to EPA in the manner described in subparagraph 17.d. (Obligations for Additional Costs). If ARCO prevails concerning any aspect of the contested costs, ARCO shall pay that portion of the costs (with Superfund Interest ) for which it did not prevail to the United States in the manner described in subparagraph 17.d. (Obligations for Additional Costs). The dispute resolution procedures set forth in this subparagraphs 17.h., 17.i., and 17.j. (Obligations for

Additional Costs) in conjunction with the procedures set forth in Section XII (Dispute Resolution for Disputes Involving EPA/DEQ ) shall be the exclusive mechanisms for resolving disputes regarding ARCO's obligations to reimburse the United States and the State for Additional Costs.

j. All disputes regarding the applicable standard of review shall be governed by the procedures in subparagraph 52.c. (Procedures for Dispute Resolution) and the standards set forth in Paragraphs 53 (Formal Disputes under Record Review) and 54 (Other Dispute Resolution). Nothing in the Consent Decree shall be construed as an agreement by the Parties or a present determination by the Court for purposes of subparagraph 52.c. (Procedures for Dispute Resolution) as to whether resolution of any particular dispute shall be conducted pursuant to the applicable standard under either Paragraph 53 (Formal Disputes under Record Review) or Paragraph 54 (Other Dispute Resolution).

18. No Warranty Regarding Performance Standards. ARCO acknowledges and agrees that nothing in the Consent Decree constitutes a warranty or representation of any kind by the United States or the State that the work requirements set forth in the ROD or in the design plans developed to implement the Remedy will achieve the Performance Standards. The preceding sentence does not modify in any way the other terms and conditions of the Consent Decree.

#### **IV. FEDERAL AND TRIBAL NATURAL RESOURCE DAMAGES**

19. Payment by ARCO to the United States. Within 30 days of the Effective Date of the Consent Decree, ARCO shall pay to the United States \$1,700,000 plus Treasury Interest (which shall accrue from the date of entry of the Consent Decree through the Effective Date) in compromise and settlement of certain Natural Resource Damages claims of the United States against ARCO within All Sites. Such payment shall be made by FedWire EFT to the U.S.

Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 89V0279, the Site name "Clark Fork River Basin," the State of Montana, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to ARCO by the Financial Litigation Unit of the United States Attorney's Office for the District of Montana attached as Appendix B to the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. ARCO shall send notice that such payment has been made to the United States as specified in Paragraph 8 (Notices and Submissions), to the NRDA Accountant, Division of Financial Management Services, U.S. Department of the Interior, MS1313, 1849 C Street, NW, Washington, DC 20240, and to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80228. The payment made to the United States pursuant to this Paragraph 19 (Payment by ARCO to the United States) shall be retained by DOI only for assessment, restoration planning, monitoring, and oversight costs incurred or to be incurred by FWS or to restore, replace or acquire the equivalent of natural resources that were located within the area designated as All Sites and that have been injured or lost as a result of the release of Hazardous or Deleterious Substances.

20. Payment by ARCO to the Tribes. Within 30 days of the Effective Date of the Consent Decree, ARCO shall pay to the Tribes \$18,300,000 plus Treasury Interest (which shall accrue from the date of entry of the Consent Decree through the Effective Date) in settlement and compromise of the Tribes' claims against ARCO for Natural Resource Damages within All Sites. ARCO shall make such payment by electronic funds transfer in accordance with instructions provided to ARCO by the Tribes upon entry of the Consent Decree. The payment made to the Tribes pursuant to this Paragraph 20 (Payment by ARCO to the Tribes) shall be retained by the Tribes to compensate the Tribes for their claimed Natural Resource Damages

related to All Sites which shall be used to restore, replace, or acquire the equivalent of such natural resources.

21. Wetlands Restoration by ARCO.

a. Within 10 years following the entry of the Consent Decree, ARCO shall create, restore, or enhance the equivalent of 400 acres of Restored Wetlands in the Upper Clark Fork River Basin. This requirement shall be met by creating, restoring, or enhancing Restored Wetlands equal to not less than an additional 307 FEWA units in accordance with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan. The Restored Wetlands required by this Paragraph 21 (Wetlands Restoration by ARCO) shall not include any Wetlands acquired, created, restored, or enhanced as mitigation for the net loss of functional wetlands resulting from the implementation of response actions at any of the Clark Fork NPL Sites. Wetlands functions and values that are credited under the Consent Decree to meet the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) shall not be available for credit for any other purpose. In meeting its obligations under this Paragraph 21 (Wetlands Restoration by ARCO), ARCO shall be entitled to credit for Restored Wetlands it has created, restored, or enhanced through performance of response actions within the Clark Fork NPL Sites in excess of those Wetlands acquired, created, restored, or enhanced as mitigation for the net loss of functional wetlands resulting from the implementation of response actions at any of the Clark Fork NPL Sites outside the SST OU, to the extent such Wetlands are created, restored or enhanced after the lodging of the Consent Decree or created, restored or enhanced at the Lower Area One Operable Unit prior to or after lodging of the Consent Decree. However, any mitigation credits available to ARCO from response actions undertaken prior to lodging of the Consent Decree at the Warm Springs Ponds Active Area and Inactive Area Operable Units or any other Operable Units in the Clark Fork NPL Sites, may be



used to mitigate the net loss of functional wetlands at ARWWS OU and other Operable Units in the Clark Fork River Basin which result from implementation of response actions.

b. ARCO may request an extension of the deadline set forth in subparagraph 21.a (Wetlands Restoration by ARCO), of up to an additional five years if ARCO has completed the physical actions described in the ARCO Wetlands Plan in accordance with the schedules set forth in that Plan and such extension is necessary to allow time for the Wetlands created, restored, and enhanced in accordance with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) to achieve the quality of Restored Wetlands.

c. ARCO will assure that all Restored Wetlands created, restored, or enhanced pursuant to this Paragraph 21 (Wetlands Restoration by ARCO) will be protected in perpetuity through deed restrictions, conservation easements, or similar restrictive instruments. At the request of ARCO, FWS will identify a designee who is mutually acceptable to FWS and ARCO and who shall be the beneficiary of such restrictions and who shall accept and enforce restrictive instruments to protect Restored Wetlands in perpetuity.

d. Contemporaneous with ARCO's submittal of a draft final remedial design and remedial action plan to EPA or within 180 days following EPA approval, in consultation with FWS, of the remedial design, whichever is earlier, for those portions of the ARWWS OU that encompass the Opportunity Ponds, North Opportunity and South Opportunity subareas, ARCO shall submit the ARCO Wetlands Plan to FWS and EPA. The ARCO Wetlands Plan shall include, but not be limited to, provisions for the protection of the Restored Wetlands in perpetuity, a schedule for the creation, restoration, or enhancement of the Restored Wetlands, the measures to be undertaken to achieve Restored Wetlands, the proposed location of the Restored Wetlands, as well as provisions for FWS monitoring of ARCO's implementation of the Wetlands Plan, periodic progress reports, and amendment of the Wetlands Plan as necessary. The schedule set forth in the ARCO Wetlands Plan shall be coordinated with the remedial

design and remedial action schedules at the ARWWS OU. To the extent it is practicable, Restored Wetlands shall be located in soil and fill borrow areas for ARWWS OU remedial action, so long as such areas are suitable for Wetlands.

e. FWS, in consultation with EPA, shall either approve or disapprove the ARCO Wetlands Plan. If FWS, in consultation with EPA, disapproves the ARCO Wetlands Plan, FWS shall send ARCO a written notice of disapproval with a statement of the reasons for the disapproval. Upon receipt of a notice of disapproval, ARCO shall, within 60 days, correct the deficiencies and resubmit the ARCO Wetlands Plan for approval. In the event that the resubmitted ARCO Wetlands Plan, or portion thereof, is disapproved by FWS, FWS may correct the deficiencies and approve the Plan as modified. ARCO may dispute FWS's modification of the Plan in accordance with the dispute resolution procedures set forth in Section XIII (Dispute Resolution Procedures for Disputes Involving DOI).

f. Prior to its final approval of the ARCO Wetlands Plan, DOI shall afford the public, including the State and the Tribes, a reasonable opportunity to review and comment upon the ARCO Wetlands Plan.

g. Upon final approval of the ARCO Wetlands Plan by FWS, ARCO shall implement the ARCO Wetlands Plan in accordance with the schedules and requirements of this Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan.

h. Within 90 days after ARCO concludes that it has complied with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan, ARCO shall schedule and conduct an inspection to be attended by ARCO and FWS. If, after the inspection, ARCO still believes that it has fully complied with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan, within 90 days of the inspection, ARCO shall submit a completion report describing the completed project to FWS for approval, with a copy to the State and Tribes. In the report, ARCO shall state that the

equivalent of 400 acres of Restored Wetlands (equal to 307 additional FEWA units) have been created, restored, or enhanced in full satisfaction of the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan.

i. If, after completion of the inspection provided for in subparagraph 21.h. (Wetlands Restoration by ARCO), receipt and review of ARCO's completion report, and consultation with EPA, FWS determines that ARCO has failed to comply with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) or the requirements of the ARCO Wetlands Plan, FWS shall notify ARCO of the deficiencies FWS has identified and the steps necessary to comply with the requirements of this Paragraph 21 (Wetlands Restoration by ARCO) or the ARCO Wetlands Plan. Such notice shall be provided to ARCO within 365 days following FWS's receipt of ARCO's completion report. ARCO shall undertake all actions necessary to remedy the deficiencies or, within 10 days of receipt of the notice, initiate the dispute resolution procedures set forth in Section XIII (Dispute Resolution Procedures for Disputes Involving DOI).

j. If, after consultation with EPA, FWS concludes based on the initial or any subsequent completion report, and after a reasonable opportunity for review and comment by the State and Tribes, that ARCO has fulfilled its obligations under this Section, FWS will so notify ARCO in writing.

k. FWS will not seek to recover its costs of monitoring and overseeing ARCO's, the State's or the Tribes' performance of the requirements of this Section IV (Federal and Tribal Natural Resource Damages). FWS will track its costs as a technical advisor to EPA as a separate account from any costs incurred by FWS to implement the Consent Decree.

22. Wetlands/Riparian Areas Restoration by the State.

a. Within 10 years of the Effective Date of the Consent Decree, the State shall create up to 400 acres of any combination of the following in the Clark Fork River Basin:

(a) newly constructed Wetlands or restoration of destroyed Wetlands; (b) enhancement of existing Wetlands; and (c) enhancement of riparian areas on or along the Clark Fork River or its tributaries. In fulfilling the requirements of this Paragraph, the State shall not be required to incur more than \$3,200,000 in Wetlands/Riparian Areas Restoration Costs. The United States will not require the State to acquire land to meet its obligations under this Paragraph, so long as the State can achieve the required 400 acres or \$3,200,000 cap on expenditures without such acquisition.

b. The State will receive credit of one acre for each acre created, restored, or enhanced to a sufficient quality to be comparable habitat to Restored Wetlands. The State will not receive credit for any acres created, restored, or enhanced as mitigation for the net loss of functional wetlands resulting from the implementation of response actions at any of the Clark Fork NPL Sites. The State may, but need not, hold title to Wetlands or riparian areas created, restored, or enhanced pursuant to this Paragraph; however, the State will assure that all Wetlands or riparian areas created, restored, or enhanced pursuant to this Paragraph will be protected in perpetuity through deed restrictions, conservation easements, or similar restrictive instruments.

c. Within 180 days of the Effective Date of the Consent Decree, the Montana Department of Fish, Wildlife and Parks ("MDFWP") will begin developing, in consultation with FWS, the State Wetlands/Riparian Areas Plan. Consultation with FWS shall include an opportunity to review interim drafts of the Plan and periodic opportunity to consult regarding the development of the Plan before the Plan is submitted for concurrence. This Plan will include, but not be limited to, a general description of the legal means the State anticipates using to protect the Wetlands and/or riparian areas in perpetuity as required by subparagraph 22.b., a schedule for the creation, restoration, or enhancement of Wetlands and/or riparian areas, the measures to be undertaken to create, restore, or enhance the Wetlands and/or

riparian areas to comply with this Paragraph 22 (Wetlands/Riparian Areas Restoration by the State), the potential location of the Wetlands and/or riparian areas to be created, restored, or enhanced, an estimation of costs associated with the plan including administrative and indirect costs, as well as provisions for FWS monitoring of the State's implementation of the Plan, periodic progress reports, and amendment of the Plan as necessary. The State will complete the State Wetlands/Riparian Areas Plan within 2 years of Effective Date of the Consent Decree and submit it to the Regional Director, U.S. FWS, Region 6, for concurrence. If the Regional Director does not concur in the State Wetlands/Riparian Areas Plan, the Regional Director will send the State a written statement of the reasons for his or her decision. Within 90 days of receipt of the written statement of reasons, the State, in consultation with FWS, shall make revisions which the State deems appropriate considering the Regional Director's statement of reasons and resubmit the State Wetlands/Riparian Areas Plan for concurrence.

d. Upon concurrence in this Plan by the Regional Director, and after reasonable opportunity for review and comment by the public, including the Tribes and ARCO, the State shall implement the State Wetlands/Riparian Areas Plan in accordance with the schedules and requirements of the Plan. If the State and FWS are unable to agree on the State Wetlands/Riparian Areas Plan, either party may invoke the dispute resolution procedures of Paragraph 60 (Disputes Arising Between DOI and the State).

e. The State and FWS may agree to extend the 10-year deadline set forth in subparagraph 22.a. (Wetlands/Riparian Areas Restoration by the State) in order to better coordinate between the implementation of the State Wetlands/Riparian Areas Plan and the Remedial Action. If the agreed upon extension is less than an additional 10 years, such agreement shall be effective without approval of the Court. If FWS determines that the extension is a significant change to the State Wetlands/Riparian Areas Plan, FWS will provide

notice and an opportunity to comment to the public no less than 60 days prior to the Effective Date of the extension. Extensions of 10 or more years must be approved by the Court.

f. When the State concludes that it has complied with this Paragraph and the State Wetlands/Riparian Areas Plan or has incurred \$3,200,000 in Wetlands/Riparian Areas Restoration Costs, the State shall submit to the FWS Regional Director, Region 6 a completion report identifying the areas created, restored or enhanced (by general legal description) and the Wetlands/Riparian Areas Restoration Costs incurred by the State. After receiving the State's completion report, FWS shall have an opportunity to inspect the areas created, restored, or enhanced pursuant to this Paragraph and the State Wetlands/Riparian Areas Plan. FWS shall issue a written notice to the State stating either that the requirements of this Paragraph and the State Wetlands/Riparian Areas Plan have been met or identifying for the State those areas that, in FWS' opinion, are not in compliance with the requirements of this Paragraph or the State Wetlands/Riparian Areas Plan. In the event the State contends that it has satisfied the requirements of this Paragraph by expending \$3,200,000 in Wetlands/Riparian Area Restoration Costs, upon review of the State's cost summary and supporting documentation, FWS shall issue a written notice to the State stating either that the requirements of this Paragraph have been met or identifying any costs it contends are not Wetlands/Riparian Area Restoration Costs. If the State and FWS are unable to agree on whether the requirements of this Paragraph, including the State Wetlands/Riparian Areas Plan, have been satisfied, either party may invoke the dispute resolution procedures of Paragraph 60 (Disputes Arising Between DOI and the State).

g. The State shall not be required to reimburse FWS for any costs incurred by FWS in monitoring or performing actions pursuant to this Paragraph. Similarly, FWS shall not be required to reimburse the State for any costs incurred by the State in monitoring or performing actions pursuant to this Paragraph.

23. Wetlands Restoration by the Tribes.

a. Within 10 years of the Effective Date of the Consent Decree, the Tribes shall create up to 800 acres of any combination of the following in the Clark Fork River Basin: (a) newly constructed Wetlands or restoration of destroyed Wetlands; (b) enhancement of existing Wetlands; and (c) enhancement of riparian areas in the Clark Fork River Basin. This requirement shall be met by creating, restoring, or enhancing Restored Wetlands or riparian areas equal to not less than an additional 614 FEWA units in accordance with the requirements of this Paragraph 23 (Wetlands Restoration by the Tribes) and the Tribes Wetlands/Riparian Area Plan. In fulfilling the requirements of this Paragraph, the Tribes shall not be required to incur more than \$6,400,000 in Wetlands/Riparian Area Restoration Costs. The United States will not require the Tribes to acquire land to meet their obligations under this Paragraph, so long as the Tribes can achieve the required 800 acres or \$6,400,000 expenditure without such acquisition.

b. The Tribes will receive credit of one acre for each acre created, restored, or enhanced to a sufficient quality to be comparable habitat to Restored Wetlands. The Tribes may, but need not, hold title to Wetlands or riparian areas created, restored, or enhanced pursuant to this Paragraph; however, the Tribes will assure that all Wetlands or riparian areas created, restored, or enhanced pursuant to this Paragraph will be protected in perpetuity through deed restrictions, conservation easements, or similar restrictive instruments.

c. Within 180 days of the Effective Date of the Consent Decree, the Tribes will begin developing, in consultation with FWS, the Tribes Wetlands/Riparian Areas Plan. Consultation with FWS shall include an opportunity to review interim drafts of the Plan and periodic opportunity to consult regarding the development of the Plan before the Plan is submitted for concurrence. The Tribes Wetlands/Riparian Areas Plan will include, but not be limited to, a general description of the legal means the Tribes anticipate using to protect the

Wetlands and/or riparian areas in perpetuity as required in subparagraph 23.b., a schedule for the creation, enhancement, or restoration of the Wetlands or riparian areas, the measures to be undertaken to create, restore, or enhance areas to comply with this Paragraph 23 (Wetlands Restoration by the Tribes), the location of the Wetlands or riparian areas to be created, restored, or enhanced, an estimation of costs associated with the Plan, including administrative, planning, and indirect costs, as well as provisions for FWS monitoring of the Tribes' implementation of the Plan, periodic progress reports, and amendment of the Plan as necessary. The Tribes will complete the Tribes Wetlands/Riparian Areas Plan within 2 years of Effective Date of the Consent Decree and submit it to the Regional Director, U.S. FWS, Region 6, for concurrence. If the Regional Director does not concur in the Tribes Wetlands/Riparian Areas Plan, the Regional Director will send the Tribes a written statement of the reasons for his or her decision. Within 90 days of receipt of the written statement of reasons, the Tribes, in consultation with FWS, shall make revisions which the Tribes deem appropriate considering the Regional Director's statement of reasons and resubmit the Tribes Wetlands/Riparian Areas Plan for concurrence.

d. Upon concurrence in the Plan by the Regional Director, and after reasonable opportunity for review and comment by the public, including the State and ARCO, the Tribes shall implement the Tribes Wetlands/Riparian Areas Plan in accordance with the schedules and requirements of the Plan. If the Tribes and FWS are unable to agree on the Tribes Wetlands/Riparian Areas Plan, either party may invoke the dispute resolution procedures of Paragraph 61 (Disputes Arising Between DOI and the Tribes).

e. The Tribes and FWS may agree to extend the 10-year deadline set forth in subparagraph 23.a. (Wetlands Restoration by the Tribes) in order to accommodate construction or land acquisition schedules. If the agreed upon extension is less than an additional 10 years, such agreement shall be effective without approval of the Court. If FWS



determines that the extension is a significant change to the Tribes Wetlands/Riparian Areas Plan, FWS will provide notice and an opportunity to comment to the public no less than 60 days prior to the Effective Date of the extension. Extensions of 10 or more years must be approved by the Court.

f. Subject to the dispute resolution procedures set forth in Paragraph 61 (Disputes arising between DOI and the Tribes), the Tribes shall have authority over the general geographic location of the Wetlands and/or riparian areas to be created, restored, or enhanced in accordance with this Paragraph. Notwithstanding the preceding sentence, and subject to the dispute resolution procedures set forth in Paragraph 61 (Disputes arising between DOI and the Tribes), FWS shall have authority over the selection of the specific location of any Wetlands and/or riparian areas to be created, restored, or enhanced in accordance with this Paragraph.

g. When the Tribes conclude that they have complied with the requirements of this Paragraph and the Tribes Wetlands/Riparian Areas Plan or have incurred \$6,400,000 in Wetlands/Riparian Area Restoration Costs, the Tribes shall submit to FWS a completion report identifying the areas created, restored or enhanced (by general legal description) and the Wetlands/Riparian Area Restoration Costs incurred by the Tribes. After receiving the Tribes' completion report, FWS shall have an opportunity to inspect the areas created, restored, or enhanced pursuant to this Paragraph and the Tribes Wetlands/Riparian Areas Plan. FWS shall issue a written notice to the Tribes stating either that the requirements of this Paragraph and the Tribes Wetlands/Riparian Areas Plan have been met or identifying for the Tribes those areas that, in FWS's opinion, are not in compliance with this Paragraph or the Tribes Wetlands/Riparian Areas Plan. In the event the Tribes contend that they have satisfied the requirements of this Paragraph and the Tribes Wetlands/Riparian Areas Plan by expending \$6,400,000 in Wetlands/Riparian Area Restoration Costs, upon review of the Tribes' cost summary and supporting documentation, FWS shall issue a written notice to the Tribes stating

either that the requirements of this Paragraph and the Tribes Wetlands/Riparian Areas Plan have been met or identifying any costs FWS contends are not Wetlands/Riparian Area Restoration Costs. If the Tribes and FWS are unable to agree on whether the requirements of this Paragraph, including the Tribes Wetlands/Riparian Areas Plan, have been satisfied, either party may invoke the dispute resolution procedures of Paragraph 61 (Disputes arising between DOI and the Tribes).

h. The Tribes shall not be required to reimburse FWS for any costs incurred by FWS in monitoring or performing actions pursuant to this Paragraph. Similarly, FWS shall not be required to reimburse the Tribes for any costs incurred by the Tribes in monitoring or performing actions pursuant to this Paragraph.

24. Bull Trout Restoration by the State.

a. Within 10 years of the Effective Date of the Consent Decree, the State shall implement a State Bull Trout Restoration Plan for the restoration of bull trout populations or habitats in the Clark Fork River Basin in accordance with the requirements of this Paragraph.

b. In preparing and implementing this State Bull Trout Restoration Plan, the State shall spend a minimum of \$500,000 for restoration of bull trout populations or habitat in the Clark Fork River Basin. If the settlement or judgment obtained by the State for natural resource damage restoration claims for the Clark Fork River brought in the State Action is greater than \$10,000,000, the State shall spend an amount equal to 5% of its recovery in preparing and implementing the State Bull Trout Restoration Plan, but in no event shall be required to spend more than \$5,000,000 to comply with this Paragraph. In calculating the monies spent by the State in preparing and implementing the State Bull Trout Restoration Plan, the State shall receive credit for reasonable indirect, administrative, and planning costs. The funds used for bull trout restoration pursuant to this Paragraph shall come out of the State's

UCFRB Restoration Fund, established by the State CD, unless the State in its discretion, determines other funding sources will be used for such funding.

c. The funds expended by the State pursuant to this Paragraph will be in addition to the funds the State will expend pursuant to Paragraph 22 (Wetlands/Riparian Areas Restoration by the State).

d. Within 180 days of the issuance of the Record of Decision for the Clark Fork River Operable Unit or within 180 days of the settlement or judgment of the State's natural resource damage restoration claims for the Clark Fork River, whichever is later, but no later than within 5 years from the date of issuance of the Clark Fork River OU Record of Decision, the MDFWP, in consultation with FWS, will begin developing the State Bull Trout Restoration Plan. Consultation with FWS shall include an opportunity to review interim drafts of the Plan and periodic opportunity to consult regarding the development of the Plan before the Plan is submitted for concurrence. This Plan will include, but not be limited to, the design and potential location of the restoration projects, the schedule for implementation of the projects, periodic progress reports, an estimation of the costs associated with the Plan, including administrative, planning, and indirect costs, FWS monitoring of the State's implementation of the Plan, and amendment of the plan as necessary. If the State Bull Trout Restoration Plan includes the acquisition, creation, restoration, or enhancement of habitat, and MDFWP, in consultation with FWS, believes it appropriate to protect the habitat in perpetuity, the Plan will also include a general description of the legal means the State anticipates using to do so. No later than 540 days after commencing development of the State Bull Trout Restoration Plan, the State will submit the plan to the Regional Director, FWS, Region 6, for concurrence. If the Regional Director does not concur in the State Bull Trout Restoration Plan, the Regional Director will send the State a written statement of the reasons for his or her decision. Within 90 days of receipt of the written statement of reasons, the State, in consultation with FWS, shall make

revisions to the Plan which the State deems appropriate considering the Regional Director's statement of reasons. If the State and FWS are unable to agree on the State Bull Trout Restoration Plan, either Party may invoke the dispute resolution procedures of Paragraph 60 (Disputes Arising between DOI and the State).

e. Upon concurrence in the State Bull Trout Restoration Plan by the Regional Director, and after a reasonable opportunity for review and comment by the public, including the Tribes and ARCO, the State shall implement the Plan in accordance with the schedules and requirements of the Plan.

f. The funds allotted in subparagraph 24.b. (Bull Trout Restoration by the State) may, at the discretion of the State, be taken out of any funds available to the State.

g. When the State concludes that it has completed the restoration as required by this Paragraph, including the State Bull Trout Restoration Plan, the State shall submit to FWS a completion report identifying the projects completed under this Paragraph and the State Bull Trout Restoration Plan and the costs incurred in complying with this Paragraph and the State Bull Trout Restoration Plan. After receipt of the State's completion report, FWS shall have an opportunity to inspect the projects completed under this Paragraph and the State Bull Trout Restoration Plan and to assess whether the restoration projects meet the requirements of this Paragraph and the State Bull Trout Restoration Plan. FWS shall issue a written notice to the State stating either that the requirements of this Paragraph and the State Bull Trout Restoration Plan have been met or identifying for the State those steps that, in FWS' opinion, must be taken to comply with this Paragraph and the State Bull Trout Restoration Plan. If the State and FWS are unable to agree on whether the requirements of this Paragraph and the State Bull Trout Restoration Plan have been met, either party may invoke the dispute resolution procedures of Paragraph 60 (Disputes Arising Between DOI and the State).

h. The State shall not be required to reimburse FWS for any costs incurred by FWS in monitoring or performing actions pursuant to this Paragraph. Similarly, FWS shall not be required to reimburse the State for any costs incurred by the State in monitoring or performing actions pursuant to this Paragraph.

25. Bull Trout Restoration by the Tribes.

a. Within 10 years of the Effective Date of the Consent Decree, the Tribes shall spend \$1,500,000 on restoration of bull trout populations or habitat in the Clark Fork River Basin in accordance with this Paragraph. The funds expended for restoration of bull trout will be in addition to the funds expended by the Tribes pursuant to Paragraph 23 (Wetlands Restoration by the Tribes). In calculating the monies spent by the Tribes in preparing and implementing the Tribes Bull Trout Restoration Plan, the Tribes shall receive credit for reasonable indirect, administrative, and planning costs.

b. Within 180 days of the Effective Date of the Consent Decree, the Tribes, in consultation with FWS, will begin developing the Tribes Bull Trout Restoration Plan. Consultation with FWS shall include an opportunity to review interim drafts of the Plan and periodic opportunity to consult regarding the development of the Plan before the Plan is submitted for concurrence. This Plan will include, but not be limited to, the design and potential location of the restoration projects, the schedule for implementation of the projects, periodic progress reports, an estimation of the costs associated with the Plan, including administrative, planning, and indirect costs, FWS monitoring of the Tribes' implementation of the Plan, and amendment of the Plan as necessary. If the Tribes Bull Trout Restoration Plan includes the acquisition, creation, restoration, or enhancement of habitat, and MDFWP, in consultation with FWS, believes it appropriate to protect the habitat in perpetuity, the Plan will also include a general description of the legal means the Tribes anticipate using to do so. No later than 540 days after commencing development of the Tribes Bull Trout Restoration Plan, the Tribes will

submit the plan to the Regional Director, FWS, Region 6, for concurrence. If the Regional Director does not concur in the Tribes Bull Trout Restoration Plan, the Regional Director will send the Tribes a written statement of the reasons for his or her decision. Within 90 days of receipt of the written statement of reasons, the Tribes, in consultation with FWS, shall make revisions to the Plan that the Tribes deem appropriate considering the Regional Director's statement of reasons, and resubmit the plan for concurrence. If the Tribes and FWS are unable to agree on the Tribes Bull Trout Restoration Plan, either Party may invoke the dispute resolution procedures of Paragraph 61 (Dispute Arising Between DOI and the Tribes).

c. Upon FWS' concurrence in the Tribes Bull Trout Restoration Plan by the Regional Director, and after a reasonable opportunity for review and comment by the public, including ARCO and the State, the Tribes shall implement the Plan in accordance with the schedules and requirements of the Plan.

d. The funds allotted in subparagraph 25.a. (Bull Trout Restoration by the Tribes) may, at the discretion of the Tribes, be taken out of any funds available to the Tribes.

e. When the Tribes conclude that they have complied with this Paragraph and the Tribes Bull Trout Restoration Plan, the Tribes shall submit to FWS a completion report identifying the projects completed and the costs incurred in complying with this Paragraph and the Tribes Bull Trout Restoration Plan. FWS shall have an opportunity to inspect the projects completed under this Paragraph and the Tribes Bull Trout Restoration Plan and to assess whether the restoration projects meet the requirements of this Paragraph and the Tribes Bull Trout Restoration Plan. FWS shall issue a written notice to the Tribes stating either that the requirements of this Paragraph and the Tribes Bull Trout Restoration Plan have been met or identifying for the Tribes those steps that, in FWS's opinion, must be taken to comply with this Paragraph and the Tribes Bull Trout Restoration Plan. If the Tribes and FWS are unable to agree on whether the requirements of this Paragraph and the Tribes Bull Trout Restoration

Plan have been satisfied, either party may invoke the dispute resolution procedures of Paragraph 61 (Disputes Arising Between DOI and the Tribes).

f. The Tribes shall not be required to reimburse FWS for any costs incurred by FWS in monitoring or performing actions pursuant to this Paragraph. Similarly, FWS shall not be required to reimburse the Tribes for any costs incurred by the Tribes in monitoring or performing actions pursuant to this Paragraph.

26. Incorporation of Approved Submissions. Each plan or document submitted by ARCO, the State, or the Tribes in compliance with this Section shall, upon approval or concurrence, as appropriate, by FWS, be enforceable under the Consent Decree.

## **V. INTEREST ON LATE PAYMENTS**

### 27. Interest on Late Payments.

a. In the event that ARCO fails to make the payments required by Paragraph 17 (Obligations for Additional Costs) by the dates required in the Consent Decree, ARCO shall pay Superfund Interest on the unpaid balance of any such payment that ARCO is obligated to make. The Superfund Interest on Additional Costs under Paragraph 17 (Obligations for Additional Costs) shall begin to accrue on the day ARCO receives the bill as set forth in subparagraph 17.d. (Obligations for Additional Costs) through the date of ARCO's payment. Payments of Superfund Interest made under this Paragraph 27 (Interest on Late Payments) shall be in addition to any other remedies or sanctions available to the United States and the State by virtue of ARCO's failure to make timely payments under Paragraph 17 (Obligations for Additional Costs). ARCO shall make any payment required by this Paragraph 27 (Interest on Late Payments) in the manner described in subparagraph 17.d. (Obligations for Additional Costs).

b. In the event that ARCO fails to make the payment required by Paragraph 19 (Payment by ARCO to the United States) within 30 days of the Effective Date of the Consent Decree, ARCO shall pay Treasury Interest on the unpaid balance. The Treasury Interest to be paid on any late payment by ARCO under Paragraph 19 (Payment by ARCO to the United States) shall begin to accrue on the date of entry of the Consent Decree and shall accrue through the date of ARCO's payment. Payments of Treasury Interest made under this Paragraph 27 (Interest on Late Payments) shall be in addition to any other remedies or sanctions available to the United States by virtue of ARCO's failure to make timely payments under Paragraph 19 (Payment by ARCO to the United States). ARCO shall make any payments required by this Paragraph 27 (Interest on Late Payments) in the manner described in Paragraph 19 (Payment by ARCO to the United States).

c. In the event that ARCO fails to make the payments required by Paragraph 20 (Payment by ARCO to the Tribes) within 30 days of the Effective Date of the Consent Decree, ARCO shall pay Treasury Interest on the unpaid balance. The Treasury Interest to be paid on any late payment by ARCO under Paragraph 20 (Payment by ARCO to the Tribes) shall begin to accrue on the date of entry of the Consent Decree and shall accrue through the date of ARCO's payment. Payment of Treasury Interest made under this Paragraph shall be in addition to any other remedies or sanctions available to the Tribes by virtue of ARCO's failure to make timely payments under Paragraph 20 (Payment by ARCO to the Tribes). ARCO shall make all payments required by this Paragraph in the manner described in Paragraph 20 (Payment by ARCO to the Tribes).

d. In the event that ARCO fails to make the payment required by Section VI (Civil Penalty) by the date required in that Section, ARCO shall pay Superfund Interest on any unpaid balance of the civil penalty. The Superfund Interest to be paid on any late payment by ARCO under Section VI (Civil Penalty) shall begin to accrue upon the date of entry of the



Consent Decree and shall accrue through the date of ARCO's payment. Payments of Superfund Interest pursuant to this Paragraph shall be in addition to any other remedies or sanctions available to the United States by virtue of ARCO's failure to make timely payments required by Section VI (Civil Penalty). ARCO shall make all payments required by this Paragraph in the manner specified in subparagraph 17.d. (Obligations for Additional Costs)

## **VI. CIVIL PENALTY**

28. Penalty Amount. In satisfaction of the United States' claims for civil penalties and punitive damages under Sections 106(a) and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(a), 9607(c)(3), for ARCO's alleged violation of Administrative Order Docket No. CERCLA VIII-96-08, ARCO shall pay a civil penalty in the amount of \$1,800,000 in accordance with the requirements of this Section.

29. Payment Method. ARCO shall pay the civil penalty set forth in Paragraph 28 (Penalty Amount) within 30 days of the Effective Date of the Consent Decree by FedWire EFT to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 89V0279, the EPA Region and Site/Spill ID #08-22, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to ARCO by the Financial Litigation Unit of the United States Attorney's Office for the District of Montana attached as Appendix B to the Consent Decree. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. ARCO shall send notice that such payment has been made to the United States as specified in Paragraph 8 (Notices and Submissions) and the Financial Management Officer, EPA Region VIII, Office of Technical and Management Services, 999 18th Street, Denver, CO 80202 and Cost Recovery Coordinator, U.S. EPA, Montana Office, 301 South Park Street, Federal Building, Drawer 10096, Helena, Montana 59624.

## **VII. FRAMEWORK FOR FUTURE SETTLEMENT NEGOTIATIONS**

30. Intention to Settle. The United States and ARCO also wish to settle the remainder of the United States' claims and ARCO's counterclaims relating to the Clark Fork NPL Sites (except for the Montana Pole and Treating Plant Site, which was previously settled) that are not otherwise addressed by the Consent Decree, as provided for in this Section VII (Framework for Future Settlement Negotiations). The sets of claims and counterclaims described below represent logical groupings of such claims and counterclaims, based on EPA's current plans for issuing Records of Decision and other response decisions, but the exact order in which the sets of claims and counterclaims will be addressed may change. EPA shall provide notice of any such change to ARCO 60 days prior to issuing the notice letter, draft consent decree and Cost Documentation for that set of claims and counterclaims. The United States and ARCO will attempt to reach agreement to settle these claims and counterclaims in accordance with the schedule and requirements of this Section. Both the United States and ARCO enter into this process in good faith and with the intention to settle.

31. Negotiation Requirements. Negotiations for settlement of the remaining claims and counterclaims at the Clark Fork NPL Sites shall proceed in accordance with the following requirements. It is the intent of the parties to negotiate these sets of claims and counterclaims in a serial manner. If the United States does not proceed in a serial manner, EPA shall provide notice to ARCO 60 days prior to issuing subsequent notice letters, draft Consent Decrees, and Cost Documentation.

a. The record of decision for the Rocker OU was previously issued by EPA. Within 45 days after EPA transmits a notice letter, draft consent decree, and Cost Documentation for response costs associated with the Rocker OU and the Clark Fork General account, the United States and ARCO shall commence negotiations to settle the United States'

claims and ARCO's counterclaims, with respect to the Rocker OU. ARCO shall provide documentation equivalent to Cost Documentation for Rocker past costs no later than the end of the 45 day period. The negotiations will address, inter alia, interest, past costs (including allocated site wide and allocated Clark Fork general costs) through the most recent calendar year for which EPA has Cost Documentation (which shall be at least through fiscal year 1997), future work, future costs (including allocated site wide and allocated Clark Fork general costs) and documentation for future costs, waivers of claims against the Superfund, Clark Fork General account total costs and allocation methodology, and termination or conversion of all related administrative orders for response actions within this Operable Unit to consent decree requirements. Within 90 days after the negotiation period begins, the United States and ARCO will lodge the consent decree developed as a result of these negotiations, if agreement is reached. If agreement is not reached within the negotiation period, the provisions of Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations) apply.

b. After issuance of response decisions for the Butte Active Mining Area Operable Unit, and within 45 days after EPA transmits the notice letters, a draft consent decree, and Cost Documentation for the Operable Units described in this subparagraph, to ARCO and other potentially responsible parties ("PRPs") identified by EPA the United States and ARCO, and the other recipients of notice letters who are willing, shall commence negotiations to settle the United States' claims and ARCO's counterclaims with respect to the Mine Flooding/Butte Active Mining Area OUs and related removal Operable Units. ARCO shall provide documentation equivalent to Cost Documentation for its relevant past costs no later than the end of the 45 day period. The negotiations will address, inter alia, interest, past costs (including allocated site wide and allocated Clark Fork general costs) incurred through the most recent calendar year for which EPA has Cost Documentation (which shall be at least through fiscal year 1997), future work, future costs (including allocated site wide and allocated Clark

Fork general costs) and documentation for future costs, waivers of claims against the Superfund, and termination or conversion of all related administrative orders for response actions within these Operable Units to consent decree requirements. Within 90 days after the negotiation period begins, the United States and ARCO, and any other settling PRPs, will lodge the consent decree developed as a result of these negotiations, if agreement is reached. If agreement is not reached within the negotiation period, the provisions of Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations) apply.

c. The record of decision for the ARWWS OU was previously issued by EPA. Within 45 days after EPA transmits a notice letter for ARWWS OU, a draft consent decree, and Cost Documentation for the Anaconda Smelter Site, the United States and ARCO shall commence negotiations to settle the United States' claims and ARCO's counterclaims with respect to the Anaconda Smelter Site. ARCO shall provide documentation equivalent to Cost Documentation for its relevant past costs no later than the end of the 45 day period. The negotiations will address, inter alia, interest, past costs (including allocated site wide and allocated Clark Fork general costs) through the most recent calendar year for which EPA has Cost Documentation (which shall be at least through fiscal year 1997), future work, future costs (including allocated site wide and allocated Clark Fork general costs) and documentation for future costs, waivers of claims against the Superfund, and termination or conversion of all related administrative orders and consent decrees for response actions within the Anaconda Smelter Site Operable Units to consent decree requirements. Within 90 days after the negotiation period begins, the United States and ARCO shall lodge the consent decree developed as a result of these negotiations, if agreement is reached. If agreement is not reached within the negotiation period, the provisions of Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations) apply.

d. After issuance of records of decision for the Milltown Reservoir Sediments Operable Unit and the Clark Fork River Operable Unit, and within 45 days after EPA transmits notice letters, a draft consent decree, and Cost Documentation to ARCO and other PRPs identified by EPA for the Milltown Reservoir Sediments Operable Unit, the Clark Fork River Operable Unit, and the Warm Springs Ponds Operable Units (including the Mill Willow Bypass), the United States and ARCO, and the other recipients of notice letters who are willing, shall commence negotiations to settle the United States' claims and ARCO's counterclaims with respect to the Milltown Reservoir/Clark Fork River/Warm Springs Ponds Operable Units. ARCO shall provide documentation equivalent to Cost Documentation for its relevant past costs no later than the end of the 45 day period. The negotiations will address, inter alia, interest, past costs (including allocated site wide and allocated Clark Fork general costs) incurred through the most recent calendar year for which EPA has Cost Documentation (which shall be at least through fiscal year 1997), future work and future costs (including allocated site wide and allocated Clark Fork general costs) and documentation for future costs, waivers of claims against the Superfund, federal natural resource damages claims reserved pursuant to Paragraph 78.d. (General Reservation of Rights of the United States), and termination or conversion of all or certain related administrative orders for response actions within the Milltown Reservoir Site and Warm Springs Ponds OUs to consent decree requirements. Within 90 days after the negotiation period begins, the United States and ARCO, and any other settling PRPs, shall lodge the consent decree developed as a result of these negotiations, if agreement is reached. If agreement is not reached within the negotiation period, the provisions of Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations) apply.

e. After issuance of the record of decision for the Butte Priority Soils Operable Unit, and within 45 days after EPA transmits a notice letter, a draft consent decree, and Cost Documentation for the Butte Priority Soils Operable Unit and all related Operable

Units including Lower Area One to ARCO and other PRPs identified by EPA, the United States and ARCO, and the other recipients of notice letters who are willing, shall commence negotiations to settle the United States' claims and ARCO's counterclaims with respect to the Butte Priority Soils Operable Unit and all related Operable Units. ARCO shall provide documentation equivalent to Cost Documentation for its relevant past costs no later than the end of the 45 day period. The negotiations will address, inter alia, interest, past costs (including allocated site wide and allocated Clark Fork general costs) through the most recent calendar year for which EPA has Cost Documentation (which shall be at least through fiscal year 1997), future work, future costs (including allocated site wide and allocated Clark Fork general costs) and documentation for future costs, waivers of claims against the Superfund, past and future DOJ costs, and termination or conversion of all or certain related administrative orders for response actions within these Operable Units to consent decree requirements. Within 90 days after the negotiation period begins, the United States and ARCO, and any other settling PRPs, shall lodge the consent decree resulting from these negotiations, if agreement is reached. If agreement is not reached, the provisions of Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations) apply.

f. For the Non Priority Soils Operable Unit, EPA will follow notice and negotiation procedures pursuant to Section 122 of CERCLA, 42 U.S.C. § 9622.

32. EPA/DEQ Coordination with ARCO prior to Notice Letter Issuance. Prior to issuance of the notice letters referenced in subparagraphs 31.b.-31.e. (Negotiation Requirements), EPA, DEQ, and ARCO, and if appropriate other identified PRPs, shall meet to discuss the remedial design process and other appropriate response actions, including which such actions should be completed before the issuance of notice letters. Any response actions to be performed by ARCO, and if appropriate other identified PRPs, as a result of these discussions shall be performed under administrative order amendments or administrative

orders. In determining its schedule for notice, EPA shall consider, in its discretion, the complexity of the record of decision for an Operable Unit and the desire of ARCO, and if appropriate other identified PRPs, to adequately develop remedial design before the issuance of notice letters.

33. Extension or Stay of Negotiation Periods and Termination of Negotiations.

Without leave of court, the United States and ARCO may agree in writing to extend the 90-day negotiation periods set forth in subparagraphs 31.a.-31.e. (Negotiation Requirements) up to 60 additional days (so that the entire period for negotiation is 150 days), or the United States and ARCO may agree in writing to stay the negotiations until a future date. Any additional extension of the negotiation periods in subparagraphs 31.a. - 31.e. (Negotiation Requirements) shall not be effective without approval by this Court. If agreement is not reached within the 90-day negotiation periods provided in Paragraph 31 (Negotiation Requirements), or as extended or stayed in accordance with this Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations), the negotiation for that set of claims and counterclaims shall be terminated. If any negotiation period is terminated in accordance with this Paragraph, either Party may terminate all further negotiations on the remaining claims and counterclaims by serving the other Party with written notice in accordance with Paragraph 8 (Notices and Submissions).

34. Stay of the Federal Action. With respect to all claims by the United States against ARCO in the Federal Action, upon the completion of expert discovery and the filing of discovery and summary judgment motions in accordance with the Case Management Order for the Federal Action, all claims by the United States against ARCO shall be stayed. With respect to all counterclaims by ARCO against the United States in the Federal Action, upon completion of expert discovery and the filing of discovery motions in accordance with the Case Management Order for the Federal Action all counterclaims by ARCO against the United States

shall be stayed. Such stay will remain in effect while the parties are in compliance with the schedule set forth in Paragraph 31 (Negotiation Requirements) or extension or stay of that schedule under Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations). This stay shall not prevent the Court from ruling upon any motion filed and fully briefed prior to the stay, and shall not prevent either Party from requesting a ruling from this Court or any court of appeals upon a legal issue that has been fully briefed in this Court prior to the stay. Should the United States and ARCO fail to meet any of the deadlines set forth in Paragraphs 31 (Negotiation Requirements) or 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations), either Party may petition the Court to lift the stay and reinstate the litigation. In no event shall the stay relieve either the United States or ARCO of its obligation to respond to written discovery served on or before the designated close of discovery. In no event shall the stay bar the taking of depositions necessary to preserve testimony under the standards of Federal Rule of Civil Procedure 27.

35. ARCO's Reserve. ARCO has reserved \$15,000,000 ("ARCO's Reserve") for purposes of this Section VII (Framework for Future Settlement Negotiations). ARCO shall pay ARCO's Reserve to the United States in one of the following manners:

a. If the United States and ARCO reach a settlement and lodge consent decrees with respect to the Rocker Operable Unit, and the Mine Flooding/Butte Active Mine Area Operable Units, by the deadlines specified in subparagraphs 31.a.-31.b. (Negotiation Requirements), \$1,500,000 of ARCO's Reserve, shall be used to reimburse the United States as required by these consent decrees. If the consent decrees require ARCO to reimburse the United States less than \$1,500,000, ARCO may reduce ARCO's Reserve by the difference between \$1,500,000 and the amount of past response costs due to the United States under the consent decrees.



b. If the United States and ARCO reach a settlement and lodge a consent decree with respect to the Anaconda Smelter Site by the deadlines specified in subparagraph 31.c. (Negotiation Requirements) \$6,000,000 from ARCO's Reserve shall be used to reimburse the United States as required by the consent decree. If the Anaconda Smelter Site consent decree requires ARCO to reimburse the United States less than \$6,000,000, ARCO may reduce ARCO's Reserve by the difference between \$6,000,000 and the amount of past response costs due to the United States under the Anaconda Smelter Site consent decree.

c. If the United States and ARCO reach a settlement and lodge a consent decree with respect to the Milltown Reservoir/Clark Fork River Site and Warm Springs Ponds Operable Units by the deadline specified in subparagraph 31.e. (Negotiation Requirements), \$7,500,000 from ARCO's Reserve shall be used to reimburse the United States as required by the Milltown Reservoir/Clark Fork River Site and Warm Springs Ponds Operable Unit consent decree. If the Milltown Reservoir/Clark Fork River Site and Warm Springs Ponds Operable Unit consent decree requires ARCO to reimburse the United States less than \$7,500,000, ARCO may reduce ARCO's Reserve by the difference between \$7,500,000 and the amount of past response costs due to the United States under the consent decree.

d. If the United States and ARCO fail to lodge consent decrees with respect to the Rocker Operable Unit and the Mine Flooding/Butte Active Mine Area Operable Units within the deadlines specified in subparagraphs 31.a. and b. (Negotiation Requirements), or if negotiations are terminated pursuant to Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations), ARCO shall pay to the United States \$1,500,000 of ARCO's Reserve in the manner described in Paragraph 14 (Past Cost Reimbursement of ARCO). If the United States and ARCO fail to lodge a consent decree with respect to the Anaconda Smelter Site within the deadlines specified in subparagraph 31.c. (Negotiation Requirements) or if negotiations are terminated pursuant to Paragraph 33 (Extension or Stay of Negotiation Periods

and Termination of Negotiations), ARCO shall pay to the United States \$6,000,000 of ARCO's Reserve in the manner described in Paragraph 14 (Past Cost Reimbursement by ARCO). If the United States and ARCO fail to lodge a consent decree with respect to the Milltown Reservoir/Clark Fork River Site and Warm Springs Ponds Operable Units within the deadlines specified in subparagraph 31.d. or if negotiations are terminated pursuant to Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations), ARCO shall pay to the United States \$7,500,000 of ARCO's Reserve in the manner described in Paragraph 14 (Past Cost Reimbursement of ARCO). Payments required by this Paragraph 35 (ARCO's Reserve) shall be made within 30 days following the expiration of any deadline for lodging of a consent decree under the requirements set forth in subparagraphs 31.b. -31. d. (Negotiation Requirements), within 30 days following the expiration of any deadline, as extended pursuant to Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations), or following termination of negotiations pursuant to Paragraph 33 (Extension or Stay of Negotiation Periods and Termination of Negotiations).

e. The United States will apply any amounts paid pursuant to subparagraph 35.d. (ARCO's Reserve) to EPA past payroll, indirect, and travel costs for the Clark Fork NPL Sites (except the Montana Pole and Treating Plant Site), and the claims for these costs will be removed from the past cost claims of the Federal Action. If any balance remains after the reimbursement of the EPA past payroll, indirect, and travel costs, the remainder shall be initially credited generally against unreimbursed past costs for the Anaconda Smelter Site and later applied to either settled costs or costs determined to be owed to EPA at any of the Clark Fork NPL Sites.

36. Cost Documentation for Negotiations. At the beginning of each 45 day evaluation period described in Paragraph 31 (Negotiation Requirements), the United States shall provide to ARCO Cost Documentation for all past cost claims subject to that negotiation

period. The United States shall not be required to provide any additional documentation with respect to past costs beyond that defined as Cost Documentation. The parties may determine during the negotiation period the amount of past costs to be paid, discounted, or withdrawn, considering, inter alia, any incomplete Cost Documentation and EPA's efforts to supplement any incomplete Cost Documentation. The failure of the United States to provide complete Cost Documentation shall not relieve ARCO of its obligation to negotiate in good faith or to make payments as required by Paragraph 35 (ARCO's Reserve).

#### **VIII. REMEDY REVIEW**

37. Periodic Reviews. EPA and DEQ shall conduct reviews of whether the Remedy is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. The costs of all such reviews are Future Response Costs under the Consent Decree.

38. Selection of Further Response Actions. If EPA or DEQ determines, at any time, that the Remedy is not protective of human health and the environment, EPA or DEQ may select further response actions for the SST OU in accordance with the requirements of CERCLA, the NCP, and/or CECRA. To the extent that EPA or DEQ seeks to recover the costs of or require ARCO to perform such further response actions, such recovery or requirement must be consistent with the provisions of the Consent Decree.

39. Opportunity To Comment. ARCO and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, shall be provided with an opportunity to comment on any further response actions proposed by EPA and DEQ as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

#### **IX. ACCESS AND INSTITUTIONAL CONTROLS**

40. Access and Institutional Controls.

a. With respect to any property within the SST OU that ARCO owns or has the legal right to control access to, ARCO shall, commencing on the date of lodging of the Consent Decree, provide the United States, the State, and their representatives and contractors, with access at all reasonable times to the property for the purpose of conducting any activity related to the Consent Decree including, but not limited to, the following activities:

- i. Monitoring work to be performed by the United States or the State pursuant to the Consent Decree or the ROD or any modification thereof;
- ii. Verifying any data or information submitted to the United States or the State;
- iii. Conducting investigations relating to contamination at or near the SST OU;
- iv. Obtaining samples;
- v. Assessing the need for, planning, or implementing additional response actions at or near the SST OU;
- vi. Implementing the Remedy and any modification thereto;
- vii. Assessing ARCO's compliance with the Consent Decree; and
- viii. Determining whether the SST OU or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by enforcement of restrictive instruments or pursuant to the Consent Decree;

b. In addition, commencing on the date of lodging of the Consent Decree, ARCO shall refrain from using any property it owns or has the legal right to control access to within the SST OU, in any manner that would interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to the Consent Decree . ARCO may obtain borrow material from such property or conduct other activities required for

implementation of response actions at Operable Units outside the SST OU on property within the SST OU in any manner that does not interfere with or adversely affect the integrity or protectiveness of the remedial measures to be implemented pursuant to the Consent Decree. Such restrictions include, but are not limited to, the use or development of groundwater wells on the property for purposes of human consumption, until such time as related Performance Standards are met; the use of the property for residential purposes of any kind, until such time as EPA has issued the Certificate of Completion for SST OU; and any other activity which interferes with the Remedy.

c. With respect to any property within the SST OU or property outside the ARWWS OU on which waste repositories created as part of the Remedial Action are located, that ARCO owns or has a legal right to impose access restrictions upon, and which is not transferred to the State or the State's designee in accordance with paragraph 9 of the State CD, ARCO shall:

i. transfer, execute, and record in the Recorder's Office of the appropriate county in the State of Montana, an easement, running with the land, that grants a right of access for the purpose of implementing the Remedy or any modifications thereto including, but not limited to, those activities listed in subparagraph 40.a. (Access and Institutional Controls) and imposes and grants the right to enforce the land/water use restrictions listed in subparagraph 40.b. (Access and Institutional Controls), or other restrictions that EPA/DEQ determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the Remedy. ARCO shall grant the access rights and the rights to enforce the land/water use restrictions to the United States, the State and their representatives, and/or other appropriate grantees as designated by the EPA or DEQ. Where appropriate to meet the objectives of the Consent Decree, the United States and the State, or their designees, shall agree to be the beneficiary of deed restrictions or accept a conservation easement and

shall enforce such restrictions or covenants which will run with the land. ARCO shall, within 180 days of the Effective Date of the Consent Decree, submit to EPA and DEQ for review and approval a draft easement with respect to such property that is enforceable under the laws of the State of Montana, and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and adequate documentation of ARCO's title to this property. Within 20 days of EPA's approval and acceptance of the easement and title information, ARCO shall record the easement with the Recorder's Office of the appropriate county. Within 10 days of its receipt of a copy showing the clerk's recording stamps, ARCO shall send a copy of the original recorded easement to EPA and DEQ in accordance with Paragraph 8 (Notices and Submissions); and

ii. assist EPA and DEQ in obtaining the same easements described in subparagraphs 40.a. and 40.c.i. (Access and Institutional Controls), by providing to EPA and DEQ relevant title information in the possession of ARCO or its agents as of the date of lodging of the Consent Decree for SST OU properties which are contaminated or used for a waste repository location but which ARCO does not own.

d. With respect to any property within the Clark Fork River Basin that ARCO owns or has a legal right to control access to, ARCO shall, commencing on the date of lodging of the Consent Decree, provide the United States, the State, and their representatives and contractors with access at all reasonable times to the property for the purpose of conducting any activity related to Section IV (Federal and Tribal Natural Resource Damages), including, but not limited to, the following activities: (i) monitoring work performed by ARCO, the State, or the Tribes under Section IV (Federal and Tribal Natural Resource Damages); (ii) verifying any data or information submitted to the United States pursuant to Section IV (Federal and Tribal Natural Resource Damages); (iii) conducting investigations relating to work performed by ARCO, the State, or the Tribes' under Section IV (Federal and Tribal Natural Resource Damages); (iv)

obtaining samples; (v) assessing ARCO's compliance with the Consent Decree; (vi) determining whether the property is being used in a manner that is prohibited or restricted by, or may need to be prohibited or restricted by, Section IV (Federal and Tribal Natural Resource Damages) or any plan submitted and approved under that Section of the Consent Decree; and (vii) for the State, obtaining access to property on which the State is performing restoration of natural resources under Section IV (Federal and Tribal Natural Resource Damages). Nothing in this Paragraph shall be construed to authorize the State or the Tribes to perform restoration of natural resources under Section IV (Federal and Tribal Natural Resource Damages) on property owned by ARCO.

e. With respect to any property ARCO owns or has a legal right to impose restrictions upon, within All Sites on which Restored Wetlands are created, restored, or enhanced by ARCO, ARCO shall transfer, execute, and record in the Recorder's Office of the appropriate county in the State of Montana, an easement, running with the land, that grants a right of access to DOI for the purpose of conducting any activity related to the Consent Decree and imposes and grants the right to enforce the restrictions set forth in the ARCO Wetlands Plan necessary to ensure the protection and maintenance of Restored Wetlands in perpetuity to the appropriate grantee, as specified in the ARCO Wetlands Plan. ARCO shall grant the access rights and the rights to enforce the land or water use restrictions to the United States and/or other appropriate grantees as designated by the United States. For each Restored Wetlands area created, enhanced, or restored by ARCO in compliance with Section IV (Federal and Tribal Natural Resource Damages), within 180 days following completion of the physical actions described in the ARCO Wetlands Plan for that area, ARCO shall submit to FWS for review and approval with respect to such property a draft easement that is enforceable under the laws of the State of Montana, and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and adequate documentation of ARCO's

title to this property. Within 20 days of FWS's approval and acceptance of the easement and title information, ARCO shall record the easement with the Recorder's Office of the appropriate county. Within 10 days following ARCO's receipt of a copy showing the clerk's recording stamps, ARCO shall send a copy of the original recorded easement to FWS in accordance with Paragraph 8 (Notices and Submissions).

f. ARCO will cooperate with the State and the United States by allowing placement of contaminated materials from the SST OU in appropriate repositories to the extent ARCO owns or controls selected repository locations at the SST OU or Opportunity Ponds. Any such use of Opportunity Ponds shall be coordinated to the extent practicable with the ARWWS OU remedial action. The costs of disposing of contaminated materials from the SST OU are Future Response Costs under the Consent Decree. If such materials are disposed at a facility which is being remediated by ARCO such as the Opportunity Ponds, any additional costs of closure and reclamation that result from the disposal of the SST OU wastes (that are over and above those costs which ARCO would otherwise incur for that disposal area) shall be treated as Future Response Costs under the Consent Decree. ARCO agrees that such disposal of contaminated materials shall not constitute a basis for transferring or imposing upon the United States or the State any liability of ARCO for currently contaminated sites.

41. Retention of Other Authorities. Notwithstanding any provision of the Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

## **X. INDEMNIFICATION AND INSURANCE**

42. Indemnification by ARCO. ARCO shall indemnify, save and hold harmless the United States and the State, and their officials, agents, employees, contractors, subcontractors,



or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of ARCO, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to the Consent Decree. Further, ARCO agrees to pay the United States and the State all costs they incur including, but not limited to, reasonable attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of ARCO, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to the Consent Decree. The United States and the State shall not be held out as a party to any contract entered into by or on behalf of ARCO in carrying out activities pursuant to the Consent Decree. Neither ARCO nor any such contractor shall be considered an agent of the United States or the State.

43. Notice of Claims for Indemnification. The United States and the State shall give ARCO notice of any claim for which the United States or the State plan to seek indemnification pursuant to Paragraph 42 (Indemnification by ARCO) and shall consult with ARCO prior to settling such claim.

44. Waiver of Claims by ARCO. ARCO waives all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between ARCO and any person for performance of activities required under the Consent Decree, including, but not limited to, claims on account of construction delays. In addition, ARCO shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between ARCO and any person for performance of the activities

required under the Consent Decree, including, but not limited to, claims on account of construction delays.

45. Insurance.

a. Prior to lodging of the Consent Decree, ARCO provided the United States with information that satisfies the United States as to ARCO's financial resources and its ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of 2 million dollars, combined single limit.

b. If, prior to FWS's notice pursuant to subparagraph 21.j. (Wetlands Restoration by ARCO), any material change occurs in the financial resources of ARCO such that ARCO may no longer be able to assure its ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of 2 million dollars, combined single limit, ARCO shall promptly notify the United States in accordance with Paragraph 8 (Notices and Submissions). Upon receipt of such notice, FWS may, in its unreviewable discretion, require ARCO to obtain that insurance.

c. If, prior to FWS's notice pursuant to subparagraph 21.j. (Wetlands Restoration by ARCO), the United States obtains information regarding any material change in the financial resources of ARCO that leads the United States to believe that ARCO may no longer have the financial ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of 2 million dollars, combined single limit, the United States shall so notify ARCO in accordance with Paragraph 8 (Notices and Submissions). ARCO shall have 60 days after receiving any such written notice to respond and provide corrected or supplemental information or otherwise assure the United States that ARCO has the ability to provide the equivalent of comprehensive general liability insurance and automobile insurance with limits of 2 million dollars, combined single limit.

d. If ARCO does not satisfactorily resolve the United States' concerns that a material change has occurred in the financial resources of ARCO such that ARCO may no longer have the financial ability to assure its ability to provide the equivalent of comprehensive general liability and automobile insurance with limits of two million dollars, combined single limit, FWS, in its unreviewable discretion, may require ARCO to obtain such insurance which names the United States and the State as additional insured parties.

e. Until the issuance of FWS's notice in accordance with subparagraph 21.j. (Wetlands Restoration by ARCO), ARCO shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing activities required of ARCO by the Consent Decree. Prior to commencement of the activities required under Paragraph 21 (Wetlands Restoration by ARCO) and the ARCO Wetlands Plan, ARCO shall provide to the United States certificates of such insurance and, if applicable, a copy of each insurance policy. ARCO shall resubmit such certificates and copies of policies each year on the anniversary date of the Effective Date of the Consent Decree. If ARCO demonstrates by evidence satisfactory to FWS that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, ARCO need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

## **XI. FORCE MAJEURE**

46. Definition of Force Majeure. "Force majeure," for purposes of the Consent Decree, is defined as any event arising from causes beyond the control of ARCO, of any entity controlled by ARCO, or of ARCO's contractors, that delays or prevents the performance of the obligations under Paragraph 21 (Wetlands Restoration by ARCO) or the ARCO Wetlands Plan

despite ARCO's best efforts to fulfill the obligation. The requirement that ARCO exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the requirements of Paragraph 21 (Wetlands Restoration by ARCO) or the ARCO Wetlands Plan.

47. Notification of Delay. If any event occurs or has occurred that may delay the performance of ARCO's obligations pursuant to Paragraph 21 (Wetlands Restoration by ARCO) or the ARCO Wetlands Plan, whether or not caused by a force majeure event, ARCO shall notify orally the FWS Project Coordinator and EPA's Remedial Project Manager for the ARWWS OU, or, in the event one or both of these designated representatives are unavailable, the Field Supervisor of the Montana Field Office, FWS, within 3 days of when ARCO first knew that the event might cause a delay. Within 5 days thereafter, ARCO shall provide in writing to the FWS Project Coordinator and EPA's Remedial Project Manager for the ARWWS OU an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; ARCO's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of ARCO, such event may cause or contribute to an endangerment to public health, welfare or the environment. ARCO shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude ARCO from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. ARCO shall be deemed to know of any

circumstance of which ARCO, any entity controlled by ARCO, or ARCO's contractors knew or should have known.

48. Procedures for Extensions. If the FWS, in consultation with EPA, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under the Consent Decree that are affected by the force majeure event will be extended by the FWS for such time as is necessary to complete those obligations. If the FWS agrees that the delay is attributable to a force majeure event, the FWS will notify ARCO in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the FWS does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, the FWS will notify ARCO in writing of its decision.

49. Effect of Dispute Resolution. If ARCO elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution for Disputes Involving DOI), it shall do so no later than 15 days after receipt of the FWS' notice. In any such proceeding, ARCO shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that ARCO complied with the requirements of Paragraphs 46 (Definition of Force Majeure) and 47 (Notification of Delay). If ARCO carries this burden, the delay at issue shall be deemed not to be a violation by ARCO of the affected obligation of the Consent Decree identified to FWS and the Court.

## **XII. DISPUTE RESOLUTION FOR DISPUTES INVOLVING EPA/DEQ**

50. Exclusivity of Remedy. Unless otherwise expressly provided for in the Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between ARCO and EPA or DEQ arising under or with respect to the Consent Decree. The procedures set forth in this Section shall not apply to actions by the United States and the State to enforce obligations of ARCO that have not been disputed in accordance with this Section. EPA and DEQ shall consult with each other to ensure coordination in this Dispute Resolution Section. Any disputes between EPA and DEQ shall be governed by the SMOA, and the result of those disputes shall be the position advanced by EPA and DEQ (“the Agencies”), for purposes of this Section of the Consent Decree.

51. Informal Negotiations with the Agencies. Any dispute between ARCO and the Agencies which arises under or with respect to the Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other parties to the dispute a written Notice of Dispute.

52. Procedures for Dispute Resolution.

a. In the event that the parties to the dispute cannot resolve a dispute by informal negotiations under Paragraph 51 (Informal Negotiations with the Agencies), then the position advanced by the Agencies shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, ARCO invokes the formal dispute resolution procedures of this Section by serving on the United States and the State a written statement of position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by ARCO. The

statement of position shall specify ARCO's position as to whether formal dispute resolution should proceed under Paragraph 53 (Formal Disputes Under Record Review) or Paragraph 54 (Other Dispute Resolution).

b. Within 21 days after receipt of ARCO's statement of position, the Agencies will serve on ARCO a statement of position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Agencies. This statement of position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 53 (Formal Disputes under Record Review) or Paragraph 54 (Other Dispute Resolution). Within 14 days after receipt of the Agencies' statement of position, ARCO may submit a further statement of position in reply.

c. If there is disagreement as to whether dispute resolution should proceed under Paragraph 53 (Formal Disputes Under Record Review) or Paragraph 54 (Other Dispute Resolution), the parties to the dispute shall follow the procedures set forth in the Paragraph determined by the Agencies to be applicable. If ARCO ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 53 (Formal Disputes Under Record Review) and 54 (Other Dispute Resolution).

53. Formal Disputes under Record Review. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and any other disputes that are accorded review on the administrative record under CERCLA or applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. Nothing in this Section shall be construed to allow any dispute by ARCO regarding the validity of the ROD's provisions, except as provided in subparagraphs 17.e.ii-17.e.iii. (Obligations for Additional Costs).

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section XII (Dispute Resolution for Disputes Involving EPA/DEQ). Where appropriate, the Agencies may allow submission of supplemental statements of position by the parties to the dispute.

b. The Agencies will issue a final administrative decision resolving the dispute based on the administrative record described in subparagraph 53.a. (Formal Disputes Under Record Review). This decision shall be binding upon ARCO, subject only to the right to seek judicial review pursuant to subparagraphs 53.c. and 53.d. (Formal Disputes Under Record Review).

c. Any administrative decision made by the Agencies pursuant to subparagraph 53.b. (Formal Disputes Under Record Review) shall be reviewable by this Court, provided that a motion for judicial review is filed by ARCO with the Court and served on the Agencies within 30 days of receipt of the Agencies' decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The Agencies may file a response to ARCO's motion within 30 days of receipt of that motion.

d. In proceedings on any dispute governed by this Paragraph 53 (Formal Disputes under Record Review), ARCO shall have the burden of demonstrating that the decision of the Agencies is arbitrary and capricious or otherwise not in accordance with law. Judicial review of the Agencies' decision shall be on the administrative record compiled pursuant to subparagraph 53.a (Formal Disputes under Record Review).

54. Other Dispute Resolution. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review



on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph 54 (Other Dispute Resolution). Following receipt of the Agencies' statement of position and any reply submitted by ARCO pursuant to Paragraph 52 (Procedures for Dispute Resolution), the Agencies will issue a final decision resolving the dispute. The Agencies' decision shall be binding on ARCO unless, within 30 days of receipt of the decision, ARCO files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The Agencies may file a response to ARCO's motion within 30 days of receipt of the motion. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

55. Effect on Other Obligations. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of ARCO under the Consent Decree not directly in dispute, unless the Agencies agree or the Court orders otherwise. Stipulated Penalties with respect to the disputed matter shall be governed by Paragraph 69 (Effect of Dispute Resolution).

### **XIII. DISPUTE RESOLUTION FOR DISPUTES INVOLVING DOI**

56. Exclusivity of Remedy. Unless otherwise expressly provided for in the Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between ARCO and DOI arising under or with respect to the Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of ARCO that have not been disputed in accordance with this Section.

57. Informal Negotiations with DOI. Any dispute between ARCO and DOI which arises under or with respect to the Consent Decree shall in the first instance be the subject of

informal negotiations between ARCO and DOI. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other party to the dispute a written Notice of Dispute.

58. Procedures for Formal Dispute Resolution between DOI and ARCO.

a. In the event that the parties to the dispute cannot resolve a dispute by informal negotiations under Paragraph 57 (Informal Negotiations with DOI), then the position advanced by DOI shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, ARCO invokes the formal dispute resolution procedures of this Section XIII (Dispute Resolution for Disputes Involving DOI) by serving on the United States a written statement of position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and all other supporting documentation relied upon by ARCO.

b. Within 21 days after receipt of ARCO's statement of position, DOI will serve on ARCO a statement of position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all other supporting documentation relied upon by DOI. Within 14 days after receipt of DOI's statement of position, ARCO may submit a further statement of position in reply.

c. DOI and ARCO shall maintain a record of the dispute, which shall include all statements of position, including supporting documentation, submitted pursuant to this Section.

d. DOI will issue its final decision resolving the dispute based on the record described in subparagraph 58.c. (Procedures for Formal Dispute Resolution between DOI and ARCO). This decision shall be binding upon ARCO unless ARCO files a motion for judicial review with the Court and serves it on all Parties within 30 days of receipt of DOI's final

decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The DOI may file a response to ARCO's motion.

e. In any judicial review of a dispute, ARCO shall have the burden of establishing by the preponderance of the evidence that the final decision of DOI is unreasonable or inconsistent with the requirements of the Consent Decree. Judicial review shall be based upon the record developed by ARCO and DOI pursuant to subparagraph 58.c. (Procedures for Formal Dispute Resolution between DOI and ARCO), unless the Court finds, upon motion of either party, that additional evidence is necessary.

59. Effect on Other Obligations. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of ARCO under the Consent Decree not directly in dispute, unless DOI agrees or the Court orders otherwise. Payment of Liquidated Damages with respect to the disputed matter shall be governed by Paragraph 69 (Effect of Dispute Resolution).

60. Disputes Arising Between DOI and the State. Disputes arising between the State and DOI regarding the Consent Decree shall be subject, in the first instance, to informal negotiations between the State and DOI. In the event the State and DOI are unable to resolve the dispute informally, within 30 days of the conclusion of informal negotiations, the State and DOI shall each prepare a written statement of position and serve it upon the other in accordance with Paragraph 8 (Notices and Submissions). Within 60 days of the service of the written statements of position, the State and DOI shall convene a formal dispute resolution conference that will be attended by the Regional Director, FWS, Region 6, and the Director of MDFWP, or their designees, and any other representatives of DOI or the State that DOI or the State, respectively, deem appropriate. If the formal dispute resolution conference fails to

resolve the dispute, within 60 days after the conclusion of the formal dispute resolution conference, either DOI or the State may file with the Court and serve on the other party a motion for judicial review of the dispute setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The other party may file a response to the motion for judicial review within 30 days of receipt of the motion. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

61. Disputes Arising Between DOI and the Tribes. Disputes arising between DOI and the Tribes regarding the Consent Decree shall be subject, in the first instance, to informal negotiations between the Tribes and DOI. In the event the Tribes and DOI are unable to resolve the dispute informally, within 30 days of the conclusion of informal negotiations, the Tribes and DOI shall each prepare a written statement of position and serve it upon the other in accordance with Paragraph 8 (Notices and Submissions). Within 60 days of the service of the written statements of position, the Tribes and DOI shall convene a formal dispute resolution conference that will be attended by the Regional Director, FWS, Region 6 or his or her designee, and a representative of the legal department for the Tribes, and any other representatives of DOI or the Tribes that DOI or the Tribes, respectively, deem appropriate. If the formal dispute resolution conference fails to resolve the dispute, within 60 days after the conclusion of the formal dispute resolution conference, either DOI or the Tribes may file with the Court and serve on the other party a motion for judicial review of the dispute setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The other party may file a response to the motion for judicial review within

30 days of receipt of the motion. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

#### **XIV. STIPULATED PENALTIES AND LIQUIDATED DAMAGES**

62. Liability for Stipulated Penalties and Liquidated Damages. ARCO shall be liable for Stipulated Penalties and Liquidated Damages in the amounts set forth in Paragraph 63 (Stipulated Penalty and Liquidated Damages Amounts) for failure to comply with the requirements of the Consent Decree specified in Paragraph 64 (Obligations Subject to Stipulated Penalties and Liquidated Damages), unless excused under Section XI (Force Majeure). "Compliance" by ARCO for purposes of this Section shall mean payment of the sums and adherence to the requirements of the Consent Decree specified in Paragraph 64 (Obligations Subject to Stipulated Penalties and Liquidated Damages) within the specified time schedules established by and approved under the Consent Decree.

63. Stipulated Penalty and Liquidated Damages Amounts. The following Stipulated Penalties and Liquidated Damages shall accrue per violation per day for any noncompliance identified in Paragraph 64 (Obligations Subject to Stipulated Penalties and Liquidated Damages).

a. For Class I, II, III, and V Violations:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1st through 14th day
\$ 1,500	15th through 30th day
\$ 3,000	31st day and beyond

b. For Class IV Violations: Liquidated Damages of \$1,000 per violation per day.

64. Obligations Subject to Stipulated Penalties and Liquidated Damages. The following obligations of ARCO are subject to the Stipulated Penalties and Liquidated Damages provided by this Section:

a. Class I Violations: Timely payments required by Paragraphs 14 (Past Cost Reimbursement by ARCO), 35 (ARCO's Reserve) and Section VI (Civil Penalty).

b. Class II Violations: Compliance with the requirements of Paragraph 15 (Payment of Future Costs by ARCO).

c. Class III Violations: Compliance with the requirements of subparagraphs 40.a.-40.c. (Access and Institutional Controls) and 17 (Obligations for Additional Costs).

d. Class IV Violations: Submission of an ARCO Wetlands Plan when due under the provisions of Paragraph 21 (Wetlands Restoration by ARCO), submission of a revised ARCO Wetlands Plan, if disapproved by FWS, when due under the provisions of Paragraph 21 (Wetlands Restoration by ARCO), submission of a completion report following FWS's inspection of the completed project when due under the provisions of Paragraph 21 (Wetlands Restoration by ARCO), timely payment to the United States when due under the provisions of Paragraph 19 (Payment by ARCO to the United States), compliance with the requirements of subparagraphs 40.d.-40.e. (Access and Institutional Control), and achievement of construction and planting milestones in accordance with the schedule specified in the ARCO Wetlands Plan.

e. Class V Violations: Compliance with the requirements of Paragraph 20 (Payment by ARCO to the Tribes).

65. Accrual of Stipulated Penalties and Liquidated Damages. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity, provided however, that (1) with respect to a deficient submission of

any plan, report or document, stipulated penalties or liquidated damages shall not accrue during the period, if any, beginning on the date of the reviewing agency's receipt of such submission until 5 days after the reviewing agency notifies ARCO of any deficiency; (2) with respect to a final administrative decision issued under either subparagraph 53.b. (Formal Disputes under Record Review) or DOI's final decision under Paragraph 58.d. (Procedures for Formal Dispute Resolution), stipulated penalties or liquidated damages shall not accrue during the period, if any, beginning on the 5th day after the date that ARCO's reply to the Agencies' or DOI's statement of position is received until the date that the final decision is issued pursuant to subparagraph 53.b. (Formal Disputes Under Record Review) or 58.d. (Procedures for Formal Dispute Resolution) regarding such dispute; and (3) with respect to judicial review by this Court or the Court of Appeals of any dispute under Section XII (Dispute Resolution for Disputes Involving EPA/DEQ) or XIII (Dispute Resolution for Disputes Involving DOI), stipulated penalties or liquidated damages shall not accrue during the period, if any, beginning on the 5th day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing in this Paragraph 65 (Accrual of Stipulated Penalties and Liquidated Damages) shall prevent the simultaneous accrual of separate penalties or damages for separate violations of the Consent Decree.

66. Demand for Payment.

a. Following the determination by EPA or the State that ARCO has failed to comply with the requirements identified in subparagraphs 64.a., 64.b. or 64.c. (Obligations Subject to Stipulated Penalties and Liquidated Damages), EPA or the State, may give ARCO written notification of the same and describe the noncompliance. EPA or the State may send ARCO a written demand for the payment of the penalties. Stipulated penalties shall accrue as provided in Paragraph 65 (Accrual of Stipulated Penalties and Liquidated Damages) regardless of whether EPA or the State have notified ARCO of a violation.

b. Following the determination by DOI that ARCO has failed to comply with the requirements identified in subparagraphs 64.d. (Obligations Subject to Stipulated Penalties and Liquidated Damages), DOI may give ARCO written notification of the same and describe the noncompliance. DOI may send ARCO a written demand for the payment of the liquidated damages. Liquidated damages shall accrue as provided in Paragraph 65 (Accrual of Stipulated Penalties and Liquidated Damages) regardless of whether DOI has notified ARCO of a violation.

c. Following the determination by the Tribes that ARCO has failed to comply with the requirements identified in subparagraph 64.e. (Obligations Subject to Stipulated Penalties and Liquidated Damages), the Tribes may give ARCO written notification of the same and describe the noncompliance. The Tribes may send ARCO a written demand for the payment of the penalties. Penalties shall accrue as provided in Paragraph 65 (Accrual of Stipulated Penalties and Liquidated Damages) regardless of whether the Tribes have notified ARCO of a violation.

67. Payment Method for Stipulated Penalties and Liquidated Damages.

a. All stipulated penalties and liquidated damages accruing under this Section shall be due and payable as set forth in this Paragraph 67 (Payment Method for Stipulated Penalties and Liquidated Damages) within 30 days of ARCO's receipt of a demand for payment of the stipulated penalties or liquidated damages , unless ARCO invokes the Dispute Resolution procedures under Section XII (Dispute Resolution for Disputes Involving EPA/DEQ) or under Section XIII (Dispute Resolution for Disputes Involving DOI).

b. Class I Stipulated Penalties: ARCO shall pay Class I Stipulated Penalties by paying 75% of the accrued penalties to the United States in the manner specified in subparagraph 17.d. (Obligations for Additional Costs) and 25% of the accrued penalties to the State in accordance with paragraphs 11 and 14 of the State CD.



c. Class II Stipulated Penalties: ARCO shall pay Class II Stipulated Penalties by paying 25% of the accrued penalties to the United States in the manner specified in subparagraph 17.d. (Obligations for Additional Costs) and 75% of the accrued penalties to the State in accordance with paragraphs 11 and 14 of the State CD.

d. Class III Stipulated Penalties: ARCO shall pay Class III Stipulated Penalties by paying 50% of the accrued penalties to the United States in the manner specified in subparagraph 17.d. (Obligations for Additional Costs) and 50% of the accrued penalties to the State in accordance with paragraphs 11 and 14 of the State CD.

e. Class IV Liquidated Damages: ARCO shall pay liquidated damages to the United States in the manner specified in Paragraph 19 (Payment by ARCO to the United States). Payments of liquidated damages pursuant to the Consent Decree shall be retained by DOI for past assessment, future assessment, restoration planning, monitoring, and oversight costs incurred or to be incurred by FWS or to restore, replace or acquire the equivalent of natural resources that were located within the area designated as All Sites and that have been injured or lost as a result of the release of Hazardous or Deleterious Substances.

f. Class V Stipulated Penalties: ARCO shall pay Class V Stipulated Penalties to the Tribes in the manner specified in Paragraph 20 (Payment by ARCO to the Tribes).

68. Effect on Obligations. The payment of stipulated penalties or liquidated damages shall not alter in any way ARCO's obligation to complete the performance of the requirements of the Consent Decree.

69. Effect of Dispute Resolution. Stipulated penalties and liquidated damages shall continue to accrue as provided in Paragraph 65 (Accrual of Stipulated Penalties and Liquidated Damages) during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the Agencies or DOI that is not appealed to this Court, ARCO shall pay accrued stipulated penalties and liquidated damages determined to be owing within 15 days of the agreement or the receipt of EPA's or DOI's decision or order;

b. If the dispute is appealed to this Court and the Agencies or DOI prevail in whole or in part, ARCO shall pay all accrued stipulated penalties and liquidated damages determined by the Court to be owing within 60 days of receipt of the Court's decision or order, except as provided in subparagraph 69.c. (Effect of Dispute Resolution) below;

c. If the District Court's decision is appealed by any Party to the dispute, and the dispute is between the Agencies and ARCO, Superfund Interest shall accrue on the stipulated penalties. Within 15 days of receipt of the final appellate court decision, ARCO shall pay all accrued stipulated penalties and Superfund Interest determined to be owing. If the District Court's decision is appealed by any Party to the dispute, and the dispute is between DOI and ARCO, Treasury Interest shall accrue on the liquidated damages. Within 15 days of receipt of the final appellate court decision, ARCO shall pay to the DOI all accrued liquidated damages and Treasury Interest determined to be owing to the United States.

70. Failure to Pay Stipulated Penalties or Liquidated Damages.

a. If ARCO fails to pay stipulated penalties to EPA or the State when due, the United States and/or the State may institute proceedings to collect the stipulated penalties, as well as Superfund Interest and the costs of enforcing the requirements of the Consent Decree, including attorney's fees. ARCO shall pay Superfund Interest on the unpaid balance of any stipulated penalties, which shall begin to accrue on the date of demand made pursuant to Paragraph 66 (Demand for Payment).

b. If ARCO fails to pay stipulated penalties to the Tribes, or liquidated damages to DOI when due, the United States or the Tribes, as appropriate, may institute

proceedings to collect the stipulated penalties or liquidated damages, as well as Treasury Interest and the costs of enforcing the requirements of the Consent Decree, including attorney's fees. ARCO shall pay Treasury Interest on the unpaid balance of any stipulated penalties or liquidated damages, which shall begin to accrue on the date of demand made pursuant to Paragraph 66 (Demand for Payment).

c. Nothing in the Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of ARCO's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA; provided, however, the United States or the State may not seek to recover both stipulated penalties or liquidated damages and statutory penalties for the same act of noncompliance.

71. Discretion of the United States, the State, and the Tribes to Waive.

a. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of its percentage of Class I, Class II, or Class III stipulated penalties or any portion of Class IV liquidated damages.

b. Notwithstanding any other provision of this Section, the State may, in its unreviewable discretion, waive any portion of its percentage of Class I, Class II, or Class III Stipulated Penalties.

c. Notwithstanding any other provision of this Section, the Tribes may, in their unreviewable discretion, waive any portion of Class V Stipulated Penalties.

**XV. COVENANTS BY THE UNITED STATES, THE STATE, AND THE TRIBES**

72. Covenants By the United States Relating to Response Actions.

a. Except as specifically provided in Paragraphs 17 (Obligations for Additional Costs), 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to Response Actions), 78 (General Reservations of Rights of the United States), and Section IX (Access and Institutional Controls), the United States covenants not to sue or to take administrative action against ARCO, its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA for recovery of Past Response Costs and Future Response Costs or injunctive relief at the SST OU, including claims for costs incurred by the United States or the State in meeting the obligations of subparagraph 17.b. (Obligations for Additional Costs). These covenants shall take effect upon the receipt of all payments required by Paragraphs 14 (Past Cost Reimbursement) and 15 (Payment of Future Costs by ARCO). These covenants are conditioned upon the satisfactory performance by ARCO of its obligations under Sections III (Reimbursement of Response Costs), V (Interest on Late Payments), VI (Civil Penalty), and IX (Access and Institutional Controls), as well as timely payment of all monies due under Section VII (Framework for Future Settlement Negotiations). These covenants extend only to ARCO, its officers, directors and employees and do not extend to any other person.

b. Except as specifically provided in Paragraphs 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to Response Actions), and 78 (General Reservations of Rights of the United States), EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA for recovery of Past Response Costs and Future Response Costs at the SST OU, including claims for costs incurred by the United States or the State in meeting the obligations of subparagraph

17.b. (Obligations for Additional Costs). EPA's covenant shall take effect upon the receipt of the payments required by Paragraph 16 (Payment of Response Costs by Settling Federal Agencies). EPA's covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under the Consent Decree. EPA's covenant extends only to the Settling Federal Agencies and does not extend to any other person. Nothing in this Paragraph 72 (Covenants by the United States Relating to Response Actions) shall alter EPA's participation in the payment of Additional Costs as specified in subparagraph 17.b. (Obligations for Additional Costs).

73. United States' Pre-Certification Reservations Relating to Response Actions.

Notwithstanding any other provision of the Consent Decree, the United States reserves, and the Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel ARCO, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies (i) to perform further response actions relating to the SST OU, or (ii) to reimburse the United States for further costs of response, if, prior to Certification of Completion of the Remedial Action:

- (1) conditions at the SST OU, previously unknown to EPA, are discovered, or
- (2) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

74. United States' Post-Certification Reservations Relating to Response Actions.

Notwithstanding any other provision of the Consent Decree, the United States reserves, and the Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel ARCO, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies (i) to

perform further response actions relating to the SST OU, or (ii) to reimburse the United States for further costs of response, if, subsequent to Certification of Completion of the Remedial Action:

- (1) conditions at the SST OU, previously unknown to EPA, are discovered, or
- (2) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

75. Definition of Information and Conditions Known to EPA.

a. For purposes of Paragraph 73 (United States' Pre-Certification Reservations Relating to Response Actions), the information and the conditions known to EPA means that information and those conditions described or contained in:

- i. the 1995 Record of Decision and the administrative record supporting it;
- ii. the 1998 ESD and the administrative record supporting it;
- iii. the SST OU Site Record;
- iv. any other records relating to the SST OU maintained by EPA and its employees;
- v. documents and expert reports prepared and/or exchanged pursuant to discovery requests or disclosure obligations in the State or Federal Actions the exchange of which are documented in writing; and
- vi. any files maintained by DOI and DEQ, or files of the State Natural Resource Damage Litigation Program to which EPA had access relating to the Clark Fork NPL Sites;

in existence on or before the date of lodging of the Consent Decree.

b. For purposes of Paragraph 74 (United States' Post-Certification Reservations Relating to Response Actions), the information and the conditions known to EPA means that information and those conditions described or contained in:

- i. the 1995 Record of Decision and the administrative record supporting it;
- ii. the 1998 ESD and the administrative record supporting it;
- iii. the SST OU Site Record;
- iv. any other records relating to the SST OU in the possession of EPA and its employees;
- v. documents and expert reports prepared and/or exchanged pursuant to discovery requests or disclosure obligations in the State or Federal Actions the exchange of which are documented in writing;
- vi. any files maintained by DOI and DEQ, or files of the State Natural Resource Damage Litigation Program to which EPA had access relating to the Clark Fork NPL Sites ; and
- vii. any other information received or discovered by EPA or the State pursuant to the requirements of the Consent Decree;

prior to the Certification of Completion of the Remedial Action and any modifications thereof.

c. For purposes of Paragraphs 73 (United States' Pre-Certification Reservations Relating to Response Actions) and 74 (United States' Post-Certification Reservations Relating to Response Actions), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information .

76. Covenants By The United States Relating to Natural Resource Damages.

Except as specifically provided in Paragraphs 77 (Natural Resources Information Reservation)

and 78 (General Reservations of Rights of the United States) of this Section, the United States covenants not to sue or to take administrative action against ARCO, its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, for recovery of Natural Resource Damages within All Sites. This covenant not to sue shall take effect upon the receipt by the United States of the payment required by Paragraph 19 (Payment by ARCO to the United States), and is conditioned upon the satisfactory performance by ARCO of all of its obligations under Section IV (Federal and Tribal Natural Resource Damages). This covenant not to sue extends only to ARCO, its officers, directors and employees and does not extend to any other person.

77. Natural Resources Information Reservation.

a. Notwithstanding any other provision of the Consent Decree, the United States reserves the right to institute proceedings against ARCO seeking recovery of Natural Resource Damages arising from:

i. injury to, destruction of, or loss of natural resources within the area defined as All Sites which results from a release of any kind of Hazardous or Deleterious Substance not identified in any Site Record or administrative record maintained by EPA or DEQ for the Clark Fork River NPL Sites as of the date of lodging of the Consent Decree; or

ii. injury to, destruction of, or loss of natural resources within the area defined as All Sites which results from unanticipated, extraordinary events, such as the failure of the Warm Springs Ponds dams or the Milltown Dam, which result in the release of substantial additional quantities of Hazardous or Deleterious Substances; or

iii. injury to, destruction of, or loss of natural resources within the area defined as All Sites to Biological Resources within a taxonomic family not addressed in the Tribes' natural resource damage assessment, the State's natural



resource damage assessment or the expert reports submitted in the Federal or State Action and that is of a Category of Injury not identified in the Tribes' natural resource damage assessment, the State's natural resource damage assessment or the expert reports submitted in the Federal or State Action. Any claim reserved by the United States pursuant to this subparagraph 77.a.iii. shall not be brought sooner than twenty years after the Effective Date of the Consent Decree and only after diligent attempts to persuade the State to address any previously unknown injury with funds the State has recovered from ARCO for Natural Resource Damages within All Sites.

b. Any statute of limitations applicable to any claim reserved by the United States pursuant to subparagraph 77.a.iii., which has not expired as of the date of lodging of the Consent Decree, shall not expire until twenty-two years from the Effective Date of the Consent Decree, notwithstanding section 113(g) of CERCLA, 42 U.S.C. § 9613(g). Except as specifically provided in the preceding sentence, ARCO reserves any defense it may have to any such claim, including a defense based upon the expiration, prior to the date of lodging of the Consent Decree, of the applicable statute of limitation for such claim.

c. The United States has asserted as part of its claims in the Federal Action that there are continuing releases and re-releases within All Sites not resulting from unanticipated, extraordinary events, and the United States agrees that such continuing releases, and their alleged effects, are not separately or combined unanticipated or extraordinary events or conditions.

78. General Reservations of Rights of the United States. The covenants set forth in Paragraphs 72 (Covenants by the United States Relating to Response Actions), 76 (Covenants by the United States Relating to Natural Resource Damages), and 87 (Plaintiffs' Mutual Covenants) do not pertain to any matters other than those expressly specified in Paragraphs 72 (Covenants by the United States Relating to Response Actions), 76 (Covenants by the United

States Relating to Natural Resource Damages), and 87 (Plaintiffs' Mutual Covenants), respectively. The United States reserves, and the Consent Decree is without prejudice to, all rights against ARCO, the State, and the Tribes, and EPA, the U.S. Department of Agriculture, and DOI reserve, and the Consent Decree is without prejudice to, all rights against the Settling Federal Agencies, with respect to all other matters, including, but not limited to, the following:

- a. claims to enforce the Consent Decree based on a failure by ARCO or the Settling Federal Agencies to meet a requirement of the Consent Decree;
- b. liability for response costs and injunctive relief under CERCLA Sections 106 and 107 or RCRA Section 7003 arising from the past, present, or future disposal, release, or threat of release of Hazardous or Deleterious Substances outside of the SST OU;
- c. liability for response costs and injunctive relief under CERCLA Sections 106 and 107 or RCRA Section 7003 for future acts of disposal of Hazardous and Deleterious Substances at the SST OU by ARCO, other than implementation of actions in connection with the Consent Decree;
- d. liability for all response costs and Natural Resource Damages, including restoration and compensable damages, and costs of assessments arising from alleged injuries to natural resources (i) on or within lands administered by the National Park Service at the Grant-Kohrs Ranch National Historic Site, including the bed and banks of the Clark Fork River to the extent owned, if at all, by the United States, and (ii) on or within lands administered by the Bureau of Land Management along or near the Clark Fork River at the 15 tracts specifically described in the August 18, 1995 report, "Preliminary Characterization of Soil Metal

Concentrations on BLM Lands, Clark Fork River, Montana,” by P. Meyer, K. Ford, R. Bump and P. Bierbach;

- e. criminal liability;
- f. liability for violations of federal or state law for acts which occur during or after implementation of the Remedial Action;
- g. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 17 (Obligations for Additional Costs) because they are outside the scope of the Remedy; provided that, if the United States or the State is successful in any future action for the recovery of the costs of such additional response actions, then the Parties shall bear the cost of such additional response actions pursuant to the rotation set forth in subparagraph 17.b. (Obligations for Additional Costs);
- h. liability for response actions for other Operable Units at the Clark Fork NPL Sites; and
- i. past and future response costs, including enforcement costs, incurred by DOJ.

79. Reservation of Response Authority. Notwithstanding any other provision of the Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law; however, the United States and the State may recover the costs of response actions taken at the SST OU from ARCO or order ARCO to perform response actions at the SST OU only to the extent provided in the Consent Decree.

80. State’s Covenants Not To Sue. Except as specifically provided in Paragraphs 17 (Obligations for Additional Costs), 81 (State’s Pre-Certification Reservations), 82 (State’s

Post-Certification Reservations), and 84 (State's General Reservations of Rights), the State covenants not to sue or to take administrative action against ARCO, its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, pursuant to Sections 106, 107(a), and 113(f)(1) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), and 9613(f)(1), Sections 711, 715, 719, 722, and 724 of CECRA, §§ 75-10-711, 75-10-715, 75-10-719, 75-10-722, and 75-10-724, MCA, or Section 7003 of RCRA, 42 U.S.C. § 6973, for recovery of Past Response Costs and Future Response Costs or injunctive relief at the SST OU. Except as provided in Paragraphs 17 (Obligations for Additional Costs), 81 (State's Pre-Certification Reservations), 82 (State's Post-Certification Reservations), and 84 (State's General Reservations of Rights), these covenants not to sue shall take effect upon the completion of ARCO's payment, as described in Paragraph 15 (Payment of Future Costs by ARCO). These covenants not to sue are conditioned upon the satisfactory performance by ARCO of its obligations under Section IX (Access and Institutional Controls). These covenants not to sue extend only to ARCO, its officers, directors and employees and do not extend to any other person. These covenants not to sue do not pertain to the State's claims for Natural Resource Damages (as the term is defined in the State CD) against ARCO relating to the SST OU. Those claims and the State's and ARCO's releases and reservations relating thereto are addressed in the State CD.

81. State's Pre-Certification Reservations. Notwithstanding any other provision of the Consent Decree, the State reserves, and the Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel ARCO (i) to perform further response actions relating to the SST OU, or (ii) to reimburse the State for further costs of response if, prior to Certification of Completion of the Remedial Action:

- (1) conditions at the SST OU, previously unknown to the State, are discovered, or
- (2) information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or this information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

82. State's Post-Certification Reservations. Notwithstanding any other provision of the Consent Decree, the State reserves, and the Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel ARCO to (i) perform further response actions relating to the SST OU, or (ii) to reimburse the State for further costs of response if, subsequent to Certification of Completion of the Remedial Action:

- (1) conditions at the SST OU, previously unknown to the State, are discovered, or
- (2) information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

83. Definition of Information and Conditions Known to the State.

a. For purposes of Paragraph 81 (State's Pre-Certification Reservations), the information and the conditions known to the State means that information and those conditions described or contained in:

- i. the 1995 Record of Decision and the administrative record supporting it;
- ii. the 1998 ESD and the administrative record supporting it;
- iii. the SST OU site record;
- iv. any other records relating to the SST OU maintained by the State and its employees;
- v. documents and expert reports prepared and/or exchanged pursuant to discovery requests or disclosure obligations in the State or Federal Actions the exchange of which are documented in writing; and
- vi. any files maintained by DEQ, the Montana Department of Fish, Wildlife and Parks, the Montana Department of Transportation or the State Natural Resource Damage Litigation Program relating to the Clark Fork NPL Sites;

in existence on or before the date of lodging of the Consent Decree.

b. For purposes of Paragraph 82 (State's Post-Certification Reservations), the information and the conditions known to the State means that information and those conditions described or contained in:

- i. the 1995 Record of Decision and the administrative record supporting it;
- ii. the 1998 ESD and the administrative record supporting it;
- iii. the SST OU site record;
- iv. any other records relating to the SST OU maintained by DEQ and its employees;
- v. documents and expert reports prepared and/or exchanged pursuant to discovery requests or disclosure obligations in the State or Federal Actions the exchange of which are documented in writing;

vi. any files maintained by DEQ, the Montana Department of Fish, Wildlife and Parks, the Montana Department of Transportation or the State Natural Resource Damage Litigation Program relating to the Clark Fork NPL Sites; and

vii. any other information received or discovered by the State pursuant to the requirements of the Consent Decree;

prior to the Certification of Completion of the Remedial Action.

c. For purposes of Paragraphs 81 (State's Pre-Certification Reservations) and 82 (State's Post-Certification Reservations), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information .

84. State's General Reservations of Rights.

a. The covenants not to sue set forth in Paragraphs 80 (State's Covenants Not to Sue) and 87 (Plaintiffs' Mutual Covenants) do not pertain to any matters other than those expressly specified in Paragraphs 80 (State's Covenants Not to Sue) and 87 (Plaintiffs' Mutual Covenants). The State reserves, and the Consent Decree is without prejudice to, all rights against ARCO, the United States, and the Tribes with respect to all other matters including, but not limited to, the following:

i. claims to enforce the Consent Decree based on a failure by ARCO to meet a requirement of the Consent Decree;

ii. liability for response costs and injunctive relief under CERCLA Sections 106 and 107, RCRA Section 7003, or parallel provisions of State law, arising from the past, present, or future disposal, release, or threat of release of Hazardous or Deleterious Substances outside the SST OU;

iii. liability for response costs and injunctive relief under CERCLA Sections 106 and 107, RCRA Section 7003, or parallel provisions of State law, for future acts of

disposal of Hazardous or Deleterious Substances at the SST OU by ARCO, other than implementation of actions in connection with the Consent Decree or the State CD;

iv. criminal liability;

v. liability for violations of federal or state law for acts which occur during or after implementation of the Remedial Action;

vi. liability, prior to Certification of Completion of the Remedial Action, for additional response actions that DEQ determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 17 (Obligations for Additional Costs), because they are outside the scope of the Remedy; provided that, if the United States or the State is successful in any future action for the recovery of the costs of such additional response actions, then the Parties shall bear the cost of such additional response actions pursuant to the rotation set forth in subparagraph 17.b. (Obligations for Additional Costs); and

vii. liability for response actions for other Operable Units at the Clark Fork NPL Sites.

b. Except as expressly provided herein, nothing in the Consent Decree waives, releases, or impairs any defense or claim against ARCO reserved by the State in the State CD. Nothing in the Consent Decree abrogates any release or limitation agreed to by the State in the State CD with respect to any defense or claim against ARCO.

85. Tribes' Release. Except as specifically provided in Paragraph 86 (Tribes' Reservation of Rights) and effective upon the Tribes' receipt of the \$18,300,000, the Tribes hereby release and discharge ARCO, its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, from any and all claims for Natural Resource Damages within All Sites and for any other relief available under CERCLA or CECRA, sought, or which could have been sought, in the Amended Complaint in Intervention filed by the Tribes in the State Action relating to All



Sites. This release extends only to ARCO, its officers, directors and employees, and does not extend to any other person.

86. Tribes' Reservation of Rights. The release set forth in Paragraph 85 (Tribes' Release) and the covenants set forth in Paragraph 87 (Plaintiffs' Mutual Covenant) do not pertain to any matters other than those expressly specified in Paragraphs 85 (Tribes' Release) and 87 (Plaintiffs' Mutual Covenants). The Tribes reserve, and the Consent Decree is without prejudice to, all rights against ARCO, the United States, and the State with respect to all other matters and to claims for Natural Resource Damages caused by unanticipated, extraordinary events, such as the failure of the Warm Springs Ponds Dam or Milltown Dam, which result in the release of substantial additional quantities of Hazardous or Deleterious Substances. The Tribes have asserted as part of its claims in the State Action that there are continuing releases and re-releases within All Sites not resulting from unanticipated, extraordinary events, and the Tribes agree that such continuing releases and their alleged effects are not separately or combined unanticipated or extraordinary.

87. Plaintiffs' Mutual Covenants. Except as specifically provided in Paragraphs 17 (Obligations for Additional Costs), 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to Response Actions), 78 (General Reservations of Rights of the United States), 81 (State's Pre-Certification Reservations), 82 (State's Post-Certification Reservations), 84 (State's General Reservations of Rights), and 86 (Tribes' Reservation of Rights), the United States, the State, and the Tribes covenant not to sue or to take administrative action against each other pursuant to Sections 106 and 107(a) of CERCLA, Section 7003 of RCRA, or CECRA for recovery of Past Response Costs and Future Response Costs or injunctive relief at the SST OU, including claims for costs incurred by the United States or the State in meeting the obligations of subparagraph 17.b. (Obligations for Additional Costs) and further covenant not to sue or to take administrative

action against each other pursuant to Section 107(a) of CERCLA for Natural Resource Damages within All Sites to the extent such Natural Resource Damages arise from the release or threat of release of hazardous substances associated with mining, milling, and smelting wastes which were the subject of claims in either the State or Federal Actions. These covenants are conditioned upon the satisfactory performance by the United States, the State and the Tribes of their respective obligations pursuant to the Consent Decree. As to the Tribes, these covenants shall take effect upon the Effective Date of the Consent Decree. As to the United States and the State, these covenants with respect to Natural Resource Damages and Past Response Costs shall take effect upon the Effective Date of the Consent Decree, while these covenants with respect to Future Response Costs shall take effect upon the Certification of Completion of the Remedial Action. These covenants extend only to the United States, the State, and the Tribes, and their successors and assigns and do not extend to any other person.

#### **XVI. COVENANTS BY ARCO AND SETTLING FEDERAL AGENCIES**

88. Covenant Not to Sue by ARCO. Subject to the reservations in Paragraph 89 (ARCO's Reservation of Rights), ARCO hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action:

a. against the United States, the State, or the Tribes, their agencies, instrumentalities, officials, employees, agents, and contractors relating to the SST OU or the United States', the State's, or the Tribes' activities in connection with the SST OU, or ARCO's obligations under Paragraph 21 (Wetlands Restoration by ARCO), including: (i) any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law; and (ii) any claim under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, CECRA Sections 75-10-715, 75-10-719, or

75-10-724, MCA, and any other theory of recovery or provision of law related to the SST OU, including any claim for reimbursement or recovery of any payment made by ARCO of Additional Costs under Paragraph 17 (Obligations for Additional Costs); and

b. against the United States or the Tribes pursuant to CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, CECRA Sections 75-10-715, 75-10-719, or 75-10-724, MCA, and any other theory of recovery or provision of law for Natural Resource Damages within All Sites.

89. ARCO's Reservation of Rights.

a. ARCO reserves, and the Consent Decree is without prejudice to:

i. claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of ARCO's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA;

ii. contribution and other claims and counterclaims against the Settling Federal Agencies in the event any claim is asserted by the United States, the State or the Tribes against ARCO under Paragraphs 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to

Response Actions), 77 (Natural Resources Information Reservation), 78.b., 78.c., 78.d., 78.g., 78.h. and 78.i. (General Reservations of Rights of the United States), 79 (Reservation of Response Authority), 81 (State's Pre-Certification Reservations), 82 (State's Post-Certification Reservations), 84 (State's General Reservations of Rights), or 86 (Tribes' Reservation of Rights), but only for contribution and other claims and counterclaims arising from the same matters, transactions, or occurrences that are raised by or directly related to the claim of the United States, the State, or the Tribes against ARCO;

iii. contribution and other claims and counterclaims against the United States for response costs at Operable Units other than the SST OU raised by ARCO in the Federal Action or which relate to the Butte portion of the Silver Bow Creek/Butte Area NPL Site, provided, however, that the reservation of rights in this subparagraph 89.a.iii. shall not be interpreted to apply to ARCO's covenant not to sue for Natural Resource Damages set forth in subparagraph 88(b) (ARCO's Covenant Not to Sue);

iv. any counterclaims or other claims against the State which are reserved in paragraph 24 of the State CD, to the extent of such reservation, which are not expressly released or limited in the Consent Decree;

v. contribution and other claims and counterclaims against the Tribes or the United States acting on behalf of the Tribes in the event any claim is asserted by the Tribes or the United States acting on behalf of the Tribes, against ARCO under Paragraph 86 (Tribes' Reservation of Rights), but only for claims and counterclaims arising from the same matters, transactions, or occurrences that are raised by or directly related to the claim of the Tribes or the United States acting on behalf of the Tribes;

vi. except as otherwise expressly provided by the Consent Decree, all of its defenses to the claims reserved by the United States, the State, and the Tribes in the Consent Decree; and

vii. in the event proceedings are initiated or an order issued seeking to compel ARCO to perform further response actions or a demand or claim is presented pursuant to the reservations of the United States or the State in Paragraphs 73 (United States' Pre-Certification Reservations Relating to Response Actions), 74 (United States' Post-Certification Reservations Relating to Response Actions), 78.g. (General Reservations of Rights of the United States), 81 (State's Pre-Certification Reservations), 82 (State's Post-Certification Reservations), or 84.a.vi. (State's General Reservations of Rights), any right to challenge such proceeding, order, demand, claim, or action, the selection of response actions, the Remedy and any modifications thereof, or any and all costs or expenses incurred or paid by the United States or the State, except as otherwise provided in Paragraph 17.g. (Obligations for Additional Costs).

b. Except as expressly provided herein, nothing in the Consent Decree waives, releases, or impairs any defense, counterclaim, or other claim against the State reserved by ARCO in the State CD. Nothing in the Consent Decree abrogates any release or limitation agreed to by ARCO in the State CD with respect to any defense, counterclaim, or other claim against the State.

90. ARCO's Limitation on Assertion of the Double Recovery Bar.

a. Notwithstanding any other provision of the Consent Decree or any provision of the State CD, ARCO will not assert its defense, if any, under the bar to double recovery set forth in CERCLA Section 107(f)(1) based on the Consent Decree, the State CD, or future settlements between ARCO and the State of the State's claims for the Step 2 Sites described in the State CD against claims for Natural Resource Damages (1) on or within the lands administered by the National Park Service at the Grant-Kohrs Ranch National Historic Site, including the bed and banks of the Clark Fork River to the extent owned, if at all, by the United States, or (2) on or within lands administered by the Bureau of Land Management along

or near the Clark Fork River at the 15 tracts specifically described in the August 18, 1995 report, "Preliminary Characterization of Soil Metal Concentrations on BLM Lands, Clark Fork River, Montana," by P. Meyer, K. Ford, R. Bump and P. Bierbach.

b. Notwithstanding any other provision of the Consent Decree, ARCO agrees it will not assert the bar to double recovery set forth in CERCLA Section 107(f)(1) based upon the Consent Decree in any litigation seeking restoration damages for injury to, destruction of, or loss of natural resources within the Step 2 Sites, as defined in the State CD, which is pursued by the State under Section X of the State CD and related provisions thereof.

c. Notwithstanding the provisions of subparagraph 90.a. (ARCO's Limitation on Assertion of the Double Recovery Bar), in the event the United States institutes a proceeding against ARCO seeking recovery of Natural Resource Damages pursuant to subparagraph 77.a.iii. (Natural Resources Information Reservation), ARCO may assert its defense, if any, to such claims of the United States under the bar to double recovery set forth in CERCLA Section 107(f)(1), 42 U.S.C. § 9607(f)(1)

91. No Preauthorization of Claims. Nothing in the Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

92. ARCO's Waiver of Contribution Claims. ARCO agrees not to assert contribution, cost recovery, or other claims or counterclaims relating to the SST OU against third parties, including other potentially responsible parties, except for: (1) claims hereby reserved by ARCO against any current or former railroad owner or operator for liability related to ownership or operation of railroad-related properties or facilities; and (2) claims based on future conduct of third parties. ARCO's covenant not to sue third parties shall be void in the event and to the same extent the United States or the State demand additional payment or institute additional proceedings in this action or in a new action, or issue a new administrative

order to ARCO pursuant to the terms and conditions of the Consent Decree. ARCO agrees to indemnify the State for any losses resulting from claims brought against the State as a result of the claims reserved by ARCO against the railroad potentially responsible parties. However, such indemnification shall not be required to the extent that ARCO's claims against the railroad potentially responsible parties result from a demand for additional payment, initiation of additional proceedings, or issuance of a new administrative order to ARCO pursuant to the terms and conditions of the Consent Decree.

93. Covenant by Settling Federal Agencies. Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the SST OU or the Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to the Consent Decree) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

## **XVII. EFFECT ON NON-PARTIES; CONTRIBUTION PROTECTION**

94. Effect on Non-Parties. Nothing in the Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to the Consent Decree. Except as expressly provided herein, the preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to the Consent Decree may have under applicable law. Except as expressly provided elsewhere in the Consent Decree, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have

with respect to any matter, transaction, or occurrence relating in any way to the matters addressed in the Consent Decree against any person not a Party hereto.

95. Contribution Protection. The Parties agree, and by entering the Consent Decree this Court finds, that ARCO and the Settling Federal Agencies, are entitled, as of the Effective Date of the Consent Decree, to protection from contribution actions or claims by third parties as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in the Consent Decree. For purposes of this Paragraph 95 (Contribution Protection) and Paragraph 94 (Effect on Non-Parties), “matters addressed” in the Consent Decree include: Past Response Costs and Future Response Costs at the SST OU, performance of response actions at the SST OU, costs incurred by ARCO for restoration actions required under Paragraph 21 (Wetlands Restoration by ARCO), any costs incurred by any private party including ARCO at the SST OU, and Natural Resource Damages within the scope of the Covenants of the United States and the Tribes.

96. Notification of Contribution Actions. ARCO agrees that, with respect to any suit or claim for contribution brought by it for matters related to the Consent Decree, it will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim. ARCO also agrees that, with respect to any suit or claim for contribution brought against it for matters related to the Consent Decree, it will notify in writing the United States and the State within 10 days of service of the complaint on it. In addition, ARCO shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting such a case for trial.

97. Waiver of Claim-Splitting Defenses.

a. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the SST OU, or claims reserved in Paragraph 78.d. (General Reservations of Rights of the



United States), ARCO shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the Federal Action; provided, however, that nothing in this Paragraph 97 (Waiver of Claim-Splitting Defenses) affects the enforceability of the covenants set forth in Section XV (Covenants by the United States, the State, and the Tribes).

b. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the SST OU, or claims reserved in Paragraph 78.d. (General Reservations of Rights of the United States), the United States shall not use any provision of the Consent Decree to assert or maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by ARCO in the subsequent proceeding were or should have been brought in the Federal Action; provided, however, that nothing in this Paragraph 97 (Waiver of Claim-Splitting Defenses) affects the enforceability of the covenants set forth in Section XVI (Covenants by ARCO and Settling Federal Agencies).

c. In any subsequent administrative or judicial proceeding initiated by the State for injunctive relief or recovery of response costs pertaining to the Clark Fork NPL Sites, ARCO shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue-preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been brought in the State Action; provided, however, that nothing in this Paragraph affects the enforceability of the covenants by the State set forth in Paragraph 80 (State's Covenants Not to Sue).

## **XVIII. ACCESS TO INFORMATION**

98. Cooperation in Response Actions. ARCO will cooperate with the State and the United States to implement response actions within the SST OU, including providing and utilizing data generated by or for ARCO prior to the lodging of the Consent Decree. In response to reasonable requests by the State or the United States, ARCO will cooperate in making available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the SST OU, subject to their right to counsel or any other right under State and Federal law. ARCO will not be required to generate new data relating to the SST OU or to cooperate in any way that would require ARCO to incur costs in any one year period in excess of \$25,000. To the extent ARCO generates data relating to the SST OU or the Remedy after lodging of the Consent Decree, ARCO will cooperate by promptly providing such data to the State and the United States.

99. Provision of Documents. Subject to the assertion of privilege claims in accordance with Paragraph 100 (Claims of Privilege), ARCO shall provide to the United States and the State, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to the SST OU or to the implementation of the Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing and correspondence; provided, however, that ARCO shall not be required to re-produce any documents already provided to the United States or the State.

100. Claims of Privilege

a. ARCO may assert business confidentiality claims covering part or all of the documents or information submitted to the United States or the State under the Consent

Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by the Agencies will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of business confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified ARCO that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information with 30 days prior written notice to ARCO.

b. ARCO may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law, or if the documents are requested by the State, any other privilege recognized by State law. If ARCO asserts such a privilege in lieu of providing the documents over which it asserts a privilege, and if ARCO has not previously provided a privilege log to the State or United States for the documents subject to the request, ARCO shall provide the United States and the State with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information: and (6) the privilege asserted by ARCO. However, no documents, reports or other information that ARCO is required to create or generate by the Consent Decree shall be withheld on the grounds that they are privileged.

c. No claim of confidentiality or privilege shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data at or around the SST OU.

d. Nothing in this Section XVIII (Access to Information) shall require ARCO to produce any documents, records, or other information that ARCO has previously produced to

the United States or the State, although ARCO shall cooperate with the United States and the State to identify the approximate date(s) of such previous production or other information to assist the United States or the State in locating previously produced documents.

## **XIX. RETENTION OF RECORDS**

101. Records Retention Period. Until 5 years after ARCO's receipt of EPA's notification of Completion of the Remedial Action, ARCO shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate to the SST OU or liability of any person for response actions conducted and to be conducted at the SST OU, regardless of any corporate retention policy to the contrary. Until 5 years after ARCO's receipt of EPA's notification of Completion of the Remedial Action, ARCO shall also instruct its contractors and agents to preserve all documents and records relating to the SST OU.

102. Notice of Destruction of Retained Documents. At the conclusion of this document retention period, ARCO shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents.

103. Certification of ARCO. ARCO hereby certifies that, to the best of its knowledge and belief it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the SST OU since the filing of the Federal Action and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

104. Records Retention by Settling Federal Agency. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA and

State requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. § 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XX. MODIFICATION**

105. Modifications of Schedules. Schedules specified in the Consent Decree may be modified by agreement of the United States and the party responsible for performing under the schedule, except as expressly provided in the Consent Decree. All such modifications shall be made in writing.

106. Other Modifications. Except as provided in Paragraph 105 (Modifications of Schedules) or otherwise expressly set forth in the Consent Decree, there shall be no modification of the Consent Decree either before or after its entry by the Court without written agreement of all the Parties to the Consent Decree and approval by the Court.

107. Authority of the Court. Nothing in the Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to the Consent Decree proposed by the Parties.

## **XXI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

108. Lodging of the Decree. The Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), CECRA, § 75-10-713 and -723, MCA, and 28 C.F.R. § 50.7. The United States and the State reserve the right to withdraw or withhold their consent if the public comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. The Tribes consent to the entry of the Consent Decree upon notice by the United States that the United States consents to entry of the Consent Decree and after the United States has consulted with the Tribes regarding the public comments received. ARCO consents to the entry of the

Consent Decree without further notice. If either the United States or the State withdraws its consent to the Consent Decree, the Consent Decree shall be null and void; provided, however, any interim payment made by ARCO pursuant to subparagraph 15.a. (Payment of Future Costs by ARCO) shall be returned to ARCO with Earnings thereon. The Consent Decree as approved by the Court may not be appealed by any Party.

109. Effect of Court's Decision not to Approve. If for any reason the Court should decline to approve the Consent Decree in the form presented, the Consent Decree shall be null and void and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

110. ARCO's Right to Comment. ARCO will be entitled to comment upon any document for which public comment is sought or required. ARCO will be entitled to comment directly on design and implementation of the remedial and restoration actions at the SST OU insofar as they affect other Operable Units at which ARCO is conducting or funding response actions. The State will provide ARCO with a copy of each major design document as soon as the document becomes publicly available.

## **XXII. ENTRY OF FINAL JUDGMENT**

111. Rule 54(b) Final Judgment. Upon the Court's approval of the Consent Decree and the State CD, the Consent Decree shall be entered as a final judgment under Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay in entering this judgment.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 19\_\_.

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United States District Judge

THE UNDERSIGNED PARTY enters into the Consent Decree in the matter of United States v. Atlantic Richfield Company, 89-039-BU-PGH (D. Mont.) relating to the Streamside Tailings Operable Unit.

FOR THE UNITED STATES OF AMERICA:

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Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

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BRUCE GELBER, Deputy Chief

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STEVEN A. HERMAN  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
U.S. EPA  
401 M Street, SW  
Washington, DC



THE UNDERSIGNED PARTY enters into the Consent Decree in the matter of State of Montana v. Atlantic Richfield Company, 83-317-HLN-PGH (D. Mont.).

FOR THE STATE OF MONTANA:

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MARC RACICOT  
Governor

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JOE MAZUREK  
Attorney General

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WILLIAM B. KIRLEY  
Counsel for DEQ

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ROBERT G. COLLINS  
Assistant Attorney General  
Counsel of Record

THE UNDERSIGNED PARTY enters into the Consent Decree in the matter of State of Montana v. Atlantic Richfield Company, 83-317-HLN-PGH (D. Mont.).

FOR THE CONFEDERATED SALISH AND KOOTENAI TRIBE OF THE FLATHEAD RESERVATION:

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MICHAEL T. PABLO  
Chairman  
Tribal Council

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JOSEPH P. HOVENKOTTER  
Counsel of Record

THE UNDERSIGNED PARTY enters into the Consent Decree in the matter of United States v. Atlantic Richfield Company, 89-039-BU-PGH (D. Mont.) relating to the Streamside Tailings Operable Unit, and State of Montana v. Atlantic Richfield Company, 83-317-HLN-PGH.

FOR THE SETTLING DEFENDANT, ATLANTIC RICHFIELD COMPANY:

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Mike R. Bowlin  
Chairman and Chief Executive Officer

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Ronald C. Redcay  
Deputy General Counsel

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Stephen H. Foster  
Counsel of Record for ARCO